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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

VOL. 146,

CONTAINING CASES DECIDED AT THE MAY TERM, 1896, AND NOT RE-
PORTED IN VOLUME 145, AND CASES DECIDED AT NOVEM-
BER TERM, 1896.

INDIANAPOLIS:
LEVY BRO'S & CO., CONTRACTORS FOR THE STATE.
1897.

PUBLISHED
BY
AUTHORITY OF THE STATE OF INDIANA.

Rec. Sept. 15, 1897.

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JUDGES
OF THE
SUPREME COURT.

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. LEANDER J. MONKS. * ‡
HON. JAMES H. JORDAN. ‡ ||
HON. JAMES McCABE. †
HON. TIMOTHY E. HOWARD. †
HON. LEONARD J. HACKNEY. †

* Chief Justice at May Term, 1896.

| Chief Justice at November Term, 1896.

† Term of office commenced January 1, 1898.

‡ Term of office commenced January 7, 1895.

OFFICERS
OF THE
SUPREME COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1896, IN THE
EIGHTY-FIRST YEAR OF THE STATE.

GREEN ET AL. v. BROWN, ADMINISTRATOR.

[No. 16,636. Filed September 30, 1896.]

46	1
149	477
146	1
150	376
146	1
165	674

APPEAL.—*Assignment of Error.*—Where the court's conclusions of law relate to separate demands and liens against different persons and interests, and are in form but one conclusion, an assignment of error joined in by all the appellants, questions the correctness of the conclusions severally. *p. 3.*

SUBROGATION.—*Redemptioners' Lien.*—*Partition.*—Decedent conveyed a quarter section of land to his son E.; afterwards E. conveyed the south half of said tract to his brother J., who assumed and agreed to pay one half of the unpaid purchase price of the entire tract. Each son mortgaged his interest to a third party, and decedent in the mean time having been adjudged of unsound mind, his guardian obtained a decree against E. and J., declaring a vendor's lien, subject to the said mortgages, and purchased said lands. Decedent having died during the year, for redemption the sheriff conveyed the lands to his heirs at law, including E. and J., and after the two mortgages had been foreclosed and the property purchased by the mortgagee, decedent's administrator, upon order of court, with the estate's money, redeemed the lands from the mortgage sales. Thereafter, partition among said heirs was had, and sixty acres off of the south half of said tract was set off to E., J., and four other heirs as tenants in common, and afterwards, by exchange of conveyances, ten acres off of the east end of said sixty

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acres was conveyed to J., and the remaining fifty acres to E., and the other heirs. *Held*, that by subrogation to the rights of the mortgagee, the estate had an equitable lien on J.'s ten acres for his share of the redemption money. On the other hand, that the estate had no lien on E.'s undivided interest in the fifty acres, as the mortgage given by him was on the north half of the tract of land, and the lien must be confined to the land affected by the mortgage. *pp.* 3-8.

PARTITION.—*Title to the Real Estate Presumed not to be in Issue.*—In proceedings for the partition of real estate, title is presumed not to be in issue. *p.* 9.

SAME.—*Decedent's Estates.*—*Lien.*—A decree in partition procured by the heirs, pending the settlement of a decedent's estate, does not preclude the administrator from asserting liens held by the estate against the realty partitioned, the administrator not being made a party to the proceedings. *p.* 10.

LIENS.—*Priority Of.*—The existence of the mortgage executed by J. remaining of record unsatisfied, the foreclosure proceedings, sale and redemption, together with the administrator's report disclosing the payment by him of the money in redemption without a corresponding charge for moneys received in repayment of such redemption, were sufficient to disclose the equity in favor of the estate against J.'s interest in the land, and the estate's lien would be prior to all liens attaching subsequent to the redemption by administrator. *p.* 11.

EXECUTORS AND ADMINISTRATORS.—*Report and Resignation of Administrator, When not a Final Report.*—An administrator's report showing a complete accounting of all receipts and disbursements, and that no funds remain in his hands, which report is excepted to by certain claimants, and is accompanied by administrator's resignation, is not a final report within the meaning of the statute, but leaves the estate open for further administration. *pp.* 5 and 11.

From the Hamilton Circuit Court. *Reversed.*

Claypool & Claypool, for appellants.

Fertig & Alexander and *Roberts & Vestal*, for appellee.

HACKNEY, J.—This was a suit by the appellee to establish demands against Eli Green and Jacob C. Green, respectively, and to enforce against them and their co-appellants an equitable lien upon their interests, respectively, in sixty acres of land.

Green et al. v. Brown, Administrator.

Demurrers were sustained to answers and to amended answers, filed jointly and severally by the numerous parties, and a special finding of the facts, with a conclusion of law stated, was rendered by the court. As to one of the appellants, no assignment of error is made as to rulings upon pleadings, and as to the other appellants, assignments as to such rulings are so indefinite, both as to parties and pleadings, as to render confusion inextricable. The first and sixth assignments of error relate to the conclusion or conclusions of law and are joined in by all of the appellants. It is objected, by the appellee, that these assignments relate to conclusions of law collectively, and, therefore, raise no question as to conclusions severally. While the conclusion stated relates to separate demands and liens against different persons and interests, it is in form but one conclusion, and may be assigned as one. The correctness of the conclusion of law stated, it is conceded, involves the questions presented by the various answers to which demurrers were sustained, and in the conclusion so stated all of the appellants are interested.

The facts found were in substance that in March, 1880, Seth Green owned a quarter section of land in Hamilton county, and conveyed it to Eli Green for a consideration stated but never paid. Eli conveyed the south half of the land to Jacob C. Green upon the assumption by the latter of one half of the purchase-price owing to Seth Green. In May, 1882, Eli mortgaged the north half of said land for \$1,300.00, and Jacob mortgaged the south half for \$1,250.00, and the mortgages were duly recorded. Thereafter said Seth Green was adjudged of unsound mind, and his guardian obtained, against Eli and Jacob, a decree declaring a vendor's lien for \$3,468.59, the balance of said purchase price, subject to said two mortgages.

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The guardian purchased said lands upon said decree, and, Seth Green having died during the year for redemption, the sheriff conveyed the same to the heirs at law of said Seth, including said Eli and Jacob, with others. Later said two mortgages were foreclosed and the property was purchased thereunder by the mortgagee. An administrator of Seth Green's estate was appointed and, upon order of court, he redeemed, with the estate's money, the lands from said mortgage sales, taking assignments of the certificates of purchase, expending therefor, as to Eli, \$1,756.50, and, as to Jacob, \$1,806.50, neither of which sums was ever repaid to said estate. And still later partition was had among said heirs, in proceedings for that purpose, and sixty acres off of the south end of the south half of said quarter section were set off to Eli, Jacob, Seth J., Isaac, Phama and Rachel Green, as tenants in common, and the remainder of said quarter section was set off to the other heirs. After this partition, and in further partition of said sixty acres, by an exchange of conveyances, ten acres, off the east end of said sixty acres, were conveyed to said Jacob and his wife, and the remaining fifty acres to said five former tenants in common. Thereafter Eli conveyed his undivided one-fifth of said fifty acres to his said four tenants in common.

Before said first partition, Rachel and Phama Green mortgaged their undivided two-sixteenths interests in the quarter section to Sallie B. Loomis for \$600.00. After the partition Eli mortgaged his one-sixth interest in said sixty acres to one Rhodes for \$45.00 and to one Heath for \$77.00, and said Rachel, Phama and Isaac executed to said Sallie B. Loomis a mortgage of said fifty-acre tract for \$325.00. In the partition proceedings Claypool & Ketcham were the attorneys for said several parties named Green, and as-

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serted a lien upon the decree and against said sixty-acre tract for \$400.00 for their services. Thereafter, and when said mortgage for \$325.00 was executed, said attorneys' lien was released in consideration of the execution to a trustee for Claypool & Ketcham of a mortgage for \$425.00 upon said sixty acres. All of said mortgages were duly recorded and are unpaid and unsatisfied and were executed while said first mentioned two mortgages, those from Eli and Jacob, were of record and unsatisfied.

It is found, also, that said administrator, after making said redemption, filed his report and resignation as such, said report professing to be a complete accounting of receipts and disbursements, made since his former report, showing the expenditure for said redemptions and that no funds remained in his hands. Certain officers excepted to said report and alleged claims for fees due from said estate. No hearing was had upon said exceptions, but the court accepted the resignation of the administrator and approved his report, excepting as to the matters involved in said exceptions. It was further found that the appellee was appointed administrator *de bonis non* after the partition, the conveyance and mortgages aforesaid; that the amount owing by Jacob on account of said redemption was \$1,756.50, and that owing from Eli on said redemption was \$1,806.50.

Upon said facts the court's conclusion was as follows: "And as conclusions of law upon the foregoing facts the court finds that the plaintiff for the use of said estate does now have and hold an equitable lien on said ten acres off the south side of said lands, now in the name of Jacob C. Green and wife, for said sum of \$1,756.50, by subrogation to the rights of said security company under said mortgage and the foreclosure and sale aforesaid, and that he is entitled to foreclosure of

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said lien without relief against all the defendants herein, and that he is entitled to a like lien and foreclosure against the undivided one-fifth part of fifty acres off of the west side of said sixty acres, being the former interest of Eli Green therein, for the said sum of \$1,806.50, and that said liens are superior to any and all right, title, interest or lien of the defendants herein or upon said portions of said lands.”

One question presented is as to the correctness of the conclusion that upon the claim against Eli, a lien could be maintained against his interest in said fifty-acre tract, aside from the question of priority as to other liens, the mortgage and redemption, at the foundation of that claim, having been confined to the north half of said quarter section and the fifty acre tract having been on the south side of the south half of said quarter section. The lien which equity affords to the redemptioner must be confined to the property affected by the original lien from which redemption is made. As in this case, the claim and right of subrogation as against Eli is through the mortgage and the redemption under it. The claim, independently of the mortgage, has no feature giving support to a lien. Equity seizes upon the mortgage and the redemption, on behalf of Eli, as supplying the basis of the lien, and the amount expended in redemption simply measures the extent of the lien. There is in this case no effort to extend that lien to the property covered by the mortgage; on the contrary, it is only sought to attach the lien, as to Eli, to the sixty-acre tract. To support this effort it could only be asserted that the claim against Eli supplied the basis of the lien, and that the lien did not arise by subrogation or through the mortgage. If the estate stood in the shoes of the mortgagee it could only reach the property included in the mortgage.

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As said in Freeman on Cotenancy and Partition, section 478, "When a partition is made, the interest of a lienholder, * * * is removed from the undivided moiety of the whole, and attached to the whole of the purparty assigned to the tenant in common against whose moiety the lien was a charge. If the mortgage, however, embraced the interest of the mortgagor in some specific part of the common property, it cannot through the operation of the partition be extended to property not embraced in such mortgage."

The latter proposition is from and is supported by the case of *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

In the present instance, however, the mortgage by Eli was not of common property, but was of property held by him in severalty. Subsequently he became an owner in common with others of the property covered by the mortgage, and was also an owner in common with such others in the tract mortgaged by Jacob; but we do not perceive that the subsequent common ownership of the two tracts supplies the reason or authority for proceeding through his separate mortgage of a distinct parcel to attach a lien to another and distinct parcel as to intervening lienholders.

The conclusion, therefore, that Eli's debt should stand as an equitable lien against his interest in the fifty acres was erroneous.

It is conceded by counsel for the appellants that in the absence of partition and intervening mortgages and conveyances an equitable lien was enforceable against the interest of Jacob in the lands covered by his mortgage, and this, we think, must be true. It remains, therefore, to inquire as to the effect of the partition, conveyances and mortgages. To the proposition that the partition was an adjudication of the equity here sought to be maintained is cited *Elwood v.*

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Beymer, 100 Ind. 504. In that case Mrs. Beymer, the widow of a son of the intestate, sought partition against the widow and children of the intestate; Mrs. Elwood, the widow of said intestate, by cross-complaint, set up certain claims against Mrs. Beymer and her husband, in her favor, and a charge for an advancement to said husband by the intestate. These were sought to be charged against Mrs. Beymer as a lien upon and to the extinguishment of her interest in the land. To said cross-complaint it was answered that in a previous partition proceeding, between the same parties, wherein the lands now in question were set off to Mrs. Elwood, Mrs. Beymer and others, as tenants in common, it had been agreed in writing by all of the parties and decreed by the court that in the lands, so set off, Mrs. Beymer owned an undivided one-sixth interest, the interest now sought by her to be severed. This answer was held sufficient upon the theory that the former proceeding put at rest the liens asserted by Mrs. Elwood, as having been deemed adjudicated, because they might have been asserted and adjudicated in such former proceeding.

In that case there had been no administration of the estate of the intestate, the ownership, in addition to the mere identification of interest, had been agreed upon and adjudged; the claims, other than the small advancement, do not appear from the allegations of the cross-complaint to have possessed any merit as the basis for an equitable lien upon the land. Whether, in case of administration, the claims asserted would have been enforceable by the administrator or by the heirs in the partition proceeding, the case does not decide. The extent to which a claim against an heir may be asserted to diminish the interest of such heir in the land of an intestate as between heirs, would seem to depend upon the issue of ownership or title,

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for certainly the result is to lessen the interest upon one side and to increase the interest of the other.

A question of title is not, ordinarily, presumed to be in issue in partition proceedings, on the contrary, the presumption is that title is not in issue. *Davis v. Lennen*, 125 Ind. 185; *Spencer v. McGonagle*, 107 Ind. 410; *Luntz v. Greve*, 102 Ind. 173; *Fleenor v. Driskill*, 97 Ind. 27; *Miller v. Noble*, 86 Ind. 527.

This presumption must yield only to requirements of the law that title shall be in issue in partition and where it affirmatively appears that title is in issue. So far as title is in issue, with reference to advancements, that issue is required by the statute. Section 1203, Burns' R. S. 1894 (1189, R. S. 1881).

In the case of *Elwood v. Beymer*, *supra*, title having been in issue, both by agreement and, as to the element of advancements, by statute, such questions were put at rest. That the conclusion of that case was upon the presumption that title was in issue in the original partition proceeding is strengthened by the citation there of *Crane v. Kimmer*, 77 Ind. 215, which held that in partition proceedings title was in issue impliedly. The rule of the case so cited does not now prevail in this State, as we have already shown, and that case was criticised in *Miller v. Noble*, *supra*, upon the very point to which it was cited.

We do not, therefore, regard *Elwood v. Beymer*, *supra*, as an authority upon the questions of this case. As to whether the partition proceeding was an adjudication of the lien, it may be important to inquire where the power to enforce the lien resided. The claim did not accrue to the intestate, but arose in the course of administration and from the advancement of funds in the hands of the administrator. The estate, through the transaction by the administrator, became subrogated to the claim and lien of the mortgagee against

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Jacob's interest in the land covered by it. The claim and the lien, excepting the element of precedence, were as potent as a note and mortgage or other legal lien, and were enforceable by the administrator. If the claims had been supported by legal instead of equitable liens there could be but little question that they were enforceable by the legal representative, and not by the heirs, and it would seem to be equally true that the heirs could not, in partition, have adjusted legal liens, with administration pending. This is the effect of the holding in *Fiscus v. Moore*, 121 Ind. 547, 7 L. R. A. 235, and *New v. New*, 127 Ind. 576, excepting that in the latter case the court expressed the *dicta* that a claim acquired by the administrator against an heir, after the death of the ancestor, might be treated as an advancement and adjusted in partition proceedings between heirs. Such a claim is in no sense an advancement, since "An advancement is an irrevocable gift by a parent to a child, in anticipation of such a child's future share of the parent's estate." 1 Am. and Eng. Ency. of Law, p. 216. Such a claim belongs first to the settlement of the debts of the estate. It is of the personal estate, and is not subject to distribution or to the control of heirs before final settlement by the administrator. Pending administration, and without some special proceeding to that end by or against the administrator, we observe no such interest by the heirs in such claim as would authorize, much less require, that it should be set up in partition. The administrator is not shown to have been a party to the partition proceeding, and is not precluded by the decree therein.

The lien as to Jacob having been directed against the ten acres, which, by the proceedings and deeds in partition, vested in him and his wife does not affect the mortgages of Eli to Rhodes and Heath, nor the

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conveyance of his interest in the fifty acres to Seth J. and others, nor does it affect any of the mortgages or conveyances except as they involve said ten acres. The interest of Jacob's wife, acquired by said partition deed, is not sought to be upheld. The only remaining interests possible to be affected by the lien were those of Jacob and of Claypool & Ketcham. As to the interest of Jacob, from what we have already said, the ten acres must stand subject to the declared lien. As to Claypool & Ketcham, the only remaining inquiry is as to the effect of the record as notice to them of the lien. It is insisted that the report of the administrator and the approval thereof, with the acceptance of his resignation, was in the nature of a final settlement, and bound the estate by its declaration that all debts due the estate had been collected and that by it the estate was finally settled. We do not understand the finding of facts to imply that the report disclosed the collection of all sums owing to the estate. It is found that the reports contained a credit for the sum paid in redemption. The existence of the mortgage executed by Jacob, remaining of record unsatisfied, the foreclosure proceeding, sale and redemption, together with the report disclosing the payment of the money in redemption without a corresponding charge for moneys received in repayment of such redemption, were sufficient to disclose the equity in favor of the estate against Jacob's interest in the land. Nor could the report be accepted by the appellants as a final settlement of the estate. Exceptions were pending and the administrator was not discharged but resigned. Thus the estate was left open for further administration. *Green v. Brown, Admr.*, 8 Ind. App. 110.

The court did not err, therefore, in its conclusion that Claypool & Ketcham's mortgage was junior to the lien of the estate as to said ten acres. In holding

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that their lien and other liens were junior to the claim against Eli, as to the fifty-acre tract, the court erred.

The decree of the lower court is reversed, with instructions to restate its conclusions of law in accordance with this opinion and to render judgment pursuant thereto.

SCOTT ET AL. v. RUNNER, ASSIGNEE, ETC.

[17,875. Filed September 30, 1898.]

COURTS.—*Jurisdiction.*—*Injunction.*—The process of one court can not be used to enjoin the final process of another of equal jurisdiction, although the judgment on which such final process is based is void.

From the Jasper Circuit Court. *Reversed.*

Moon & Wolf, for appellants.

G. P. Haywood and *C. A. Burnett*, for appellee.

MCCABE, J.—This was a suit brought by the appellee in the Jasper Circuit Court against the appellant Scott, and appellant Hanley, sheriff of Jasper county, to enjoin the execution of an order of sale of certain real estate, situate in Jasper county, which order was made in attachment proceedings and judgment in favor of appellant Scott in the Howard Circuit Court.

The first question we are confronted with is: Did the Jasper Circuit Court have jurisdiction? If it did not that will end this case. In the *Indiana, etc., R. R. Co. v. Williams*, 22 Ind. 198, at page 200, it was held that no court in this State can rightfully enjoin a party from proceeding in a suit in another court of this State having equal power to grant the relief sought by the complaint on which such injunction is asked.

146	12
154	379
146	12
170	582

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To the same effect are *Gregory v. Perdue*, 29 Ind. 66, and the *Board, etc., of Vigo County v. Stout et al.*, 136 Ind. 53, 22 L. R. A. 398.

But it is insisted that it appears from the complaint and evidence that the Howard Circuit Court had no jurisdiction, and hence the rule established by these cases does not apply, because in such event, it is contended, that the judgment is void, or rather that there is no judgment or order of the Howard Circuit Court. In *Plunkett et al. v. Black*, 117 Ind. 14, the attempt was made in the Montgomery Circuit Court to enjoin the collection of an execution in the hands of the sheriff of Montgomery county, issued on a judgment recovered in the Parke Circuit Court.

It was there said: "The last question we care to consider is, had the Montgomery Circuit Court jurisdiction of the subject-matter of the action? Our conclusion is that it had not. * * * The Parke Circuit Court was a court of equal jurisdiction to that of the Montgomery Circuit Court. The execution, the service of which the appellee sought to enjoin, was the process of that court. The rule is settled in this State, that one court cannot control the execution of the orders and process of another court of equal jurisdiction. *Indiana, etc., R. R. Co. et al. v. Williams*, 22 Ind. 198; *Gregory v. Perdue*, 29 Ind. 66; *Coleman v. Barnes*, 33 Ind. 93; *Wiley v. Pavey*, 61 Ind. 457."

The same decision of the question was again made when the same case was again in this court *Black v. Plunkett et al.*, 132 Ind. 599.

It is, however, urged in argument that if the Howard Circuit Court had no jurisdiction then there was no order of that court to enjoin. But before that conclusion can be reached the Jasper Circuit Court must have jurisdiction to institute the judicial inquiry. That requires jurisdiction to interfere with the pro-

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cess of another court of equal jurisdiction, and that we have seen it has not the power to do.

It is true, that whenever a judgment is made the foundation of a right in another action in any court, whether in the court in which the judgment was rendered, or in some other court, if it appear to have been rendered without jurisdiction it may be collaterally impeached and disregarded because it is no judgment. There are numerous ways in which such judgment may be brought in question other than attempting to enjoin the execution of the process of the court rendering it. The question here is not, as counsel seem to suppose, whether the judgment can be collaterally impeached, but it is whether the process of one court can be used to enjoin the final process of another of equal jurisdiction.

Counsel for appellee say why not, if the judgment on which that final process is based is void? The answer is that that court has ample power to enjoin its own process without coming into conflict with the process of another court of equal power, and the presumption is that it will correctly administer the law if applied to, and if it does not, an appeal to a higher court will correct its errors and thus avoid all conflicts between courts of co-ordinate power. Otherwise there must be even physical conflicts between courts of equal power in the State. The Howard Circuit Court may adhere to its opinion tenaciously that it had jurisdiction and require its officer, the sheriff of Jasper county, to execute its order of sale, and the Jasper Circuit Court may be of opinion that the Howard Circuit Court had no jurisdiction, and require its officer, the coroner of Jasper county, to execute its order to restrain and prohibit the execution of the order from the Howard Circuit Court. In such a case

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which order must prevail? It must depend upon a mere question of superiority of physical force.

The law does not allow the rights of parties to be determined in that way.

An eminent author says: "The rule is that one court of concurrent jurisdiction has no power to interfere with the judgments or decrees of other courts of the same jurisdiction. Therefore, one court of co-ordinate jurisdiction will not restrain, by injunction, proceedings previously instituted in another court. And the rule extends to the processes of the court, whether mesne or final." Works on Courts and Jurisdiction, section 17, p. 69.

In *Platto v. Duester et al.*, 22 Wis., at page 484, C. J. Dixon, speaking for the Supreme Court of Wisconsin, said: "Can the execution of an order or judgment in equity in one of the circuit courts of this state be restrained by injunction, issued in an action subsequently commenced in another circuit court? Such is the question presented in this case; and I apprehend, both on principle and authority, that the power thus claimed does not exist; or if it does, that it ought never to be exercised. It is easy to see the great confusion and endless trouble and litigation which might ensue from the exercise of such a jurisdiction. The impropriety, I might say the utter absurdity, of applying to one court to restrain, modify or correct the orders or decrees of another court of co-ordinate jurisdiction, is also apparent. I think it is wholly inadmissible to do so."

In *Anthony v. Dunlap*, 8 Cal. 26, it is said: "We have before decided, that one court had no power to interfere with the judgments and decrees of another court of concurrent jurisdiction. The only case in which it will be allowed, is where the court in which the action or proceeding is pending, is unable by reason of its

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jurisdiction to afford the relief sought. Any other rule would lead to inextricable confusion."

To the same effect are *Rickett v. Johnson*, 8 Cal. 34; *Grant v. Quick*, 5 Sand. (N. Y.) 612; *Uhlfelder v. Levy*, 9 Cal. 607; *Wilson v. Baker*, 64 Cal. 475, 2 Pac. 253; *Dodge v. Northrop*, 85 Mich. 243, 48 N. W. 505; *Ex parte Bushnell*, 8 Ohio St. 599.

As the Howard Circuit Court had ample power to afford all the relief to which appellee was entitled without coming in conflict with any other court of equal power, the Jasper Circuit Court had no jurisdiction.

The judgment is reversed and the cause remanded, with instructions to dismiss the case for want of jurisdiction.

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[No. 17,939. Filed September 30, 1896.]•

GUARDIAN AND WARD.—*Sale by Guardian of Ward's Real Estate, Under Order of Court.*—A purchaser of lands at a guardian's sale under an order of the court which appointed him, such court having general jurisdiction to appoint guardians, who pays for the land, relying in good faith on such order will be protected in the title so acquired, if the guardian applies properly the proceeds of such sale, although the court was without jurisdiction to make the particular appointment.

SAME.—*Exchange of Ward's Lands for Other Lands.—Statute Construed.*—Under section 2528 R. S. 1881 (2692 Burns' R. S. 1864), which provides that whenever a better investment of the value of a ward's real estate can be made, the proper court may, on the application of the guardian, order the same or a part thereof to be sold, the court may direct an exchange of the lands of the ward for other lands.

SAME.—*Appointment of Guardian for Minor Female Whose Husband is Also a Minor.—Statute Construed.*—Section 2526, R. S. 1881 (2690, Burns' R. S. 1894), which provides that the marriage of a female ward to a person of full age shall operate as a legal discharge

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of the guardianship is no limitation on the power of the court to appoint a guardian of the estate of a minor female whose husband is also a minor.

From the Madison Superior Court. *Affirmed.*

J. C. Shuman and M. E. Forkner, for appellant.

Walker & Foster, for appellee.

HOWARD, J.—The complaint filed by the appellant in this case was in two paragraphs, the first being for partition of real estate, and the second for the recovery of rents and profits alleged to be due the appellant. The appellee answered in five paragraphs, the first being a general denial, and the others special pleas, claiming title to the land in appellee. He also filed a cross-complaint, showing his source of title, and asking that the same be quieted in him. Demurrers were overruled to the special answers and to the cross-complaint; after which appellant replied in two paragraphs, to the first of which, a special plea, the court sustained a demurrer. Issue was then joined on the general denial to the complaint and to the cross-complaint; and a trial being had, there was judgment against appellant on her complaint and for appellee on his cross-complaint. The rulings on demurrer are assigned as error.

The facts shown by the pleadings and necessary to be considered are: That in 1882 the appellant was the owner of a one-third interest in the lands described in her complaint, and the appellee the owner of the remaining two-thirds; that the appellant was then under twenty-one years of age, and was married, her husband being also a minor; that she was a resident of Madison county, and the Madison Circuit Court appointed one Benjamin M. Zion her guardian,

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and, upon the petition of such guardian, ordered him to sell his ward's interest in said lands; that her said interest was duly appraised, an additional bond given, the lands sold at private sale to the appellee, the sale confirmed by the court, and a deed in fee-simple ordered, executed and delivered; that under such sale and deed the appellee went into possession of said lands, and has occupied them ever since, claiming to be the sole owner and making lasting and valuable improvements thereon; that said guardian, under the order and direction of the court, invested the proceeds of such sale in other lands then owned by the appellee, taking a warranty deed therefor from appellee and wife in the name of the appellant; that the appellant at once went into possession of said lands so conveyed to her, and has remained in possession thereof ever since, and now occupies the same under and by virtue of the deed so made to her; that the transaction so approved by the court was in reality an exchange of real estate between appellant and appellee, but the appellant has not offered to return to appellee the land so procured from him, or to make any accounting to him for the money paid by him to her said guardian, and by such guardian invested for her in the lands now held and occupied by her; that during the times of all the aforesaid transactions by the guardian of appellant under direction of the court, she and her husband were both minors.

One of the questions to be decided is, whether the court had jurisdiction to appoint a guardian for appellant while she was a minor and intermarried with a person who was also a minor.

The court making the appointment was a court of superior jurisdiction, having authority to appoint guardians and to order the sale of real estate of minors.

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Section 2673. Burns' R. S. 1894 (2512, R. S. 1881), provides that: "The court having probate jurisdiction in each county, in term time, or the clerk thereof in vacation, shall appoint guardians of minors resident in such county, or having estate therein." One of the duties of the guardian as defined by section 2685, Burns' R. S. 1894 (2521, R. S. 1881), is, "To manage the estate for the best interests of his ward;" another is, "To account for and pay over to the proper person all of the estate of said ward." And in the next section it is provided that "The proper court may, on application of a guardian, * * * order and decree any change to be made in the investment of the estate of any ward, that may, to such court, seem advantageous to such estate." In section 2692, Burns' R. S. 1894 (2528, R. S. 1881), it is further provided, as to real estate, that whenever a better investment of the value thereof can be made, the proper court may, on the application of the guardian, order the same, or a part thereof, to be sold. And it has been decided that, under this last provision, the court may direct an exchange of the lands of the ward for other lands. *Nesbit v. Miller*, 125 Ind. 106.

The general jurisdiction of the court in the premises is therefore without question. But in *Dequindre v. Williams*, 31 Ind. 444, in which case the only authority in relation to guardians was derived from a statute creating a "court of probate," with "power to hear and determine all matters in relation to the settlement of decedent's estates," it was held that, where a guardian, who has received his appointment from a court of superior jurisdiction, having authority to make such appointments, and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells lands of his ward, under an order of such court, to one who pur-

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chases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly.

The proceeds were applied properly in the case at bar, being, by order of the court, invested in other lands in the name of the ward; so that even if the court were "without jurisdiction to make the particular appointment" of guardian, still the appellee, as purchaser at the guardian's sale, relying in good faith on the order of the court, ought to be protected in the title so acquired. All the equities are in favor of the appellee.

Moreover, we do not think that the appointment was unauthorized. The statute, as above cited, provides that the court "shall appoint guardians of minors resident in such county, or having estate therein." This is an absolute grant of jurisdiction to appoint guardians for all minors. The only limitation made upon the power thus given is found in section 2690, Burns' R. S. 1894 (2526, R. S. 1881), which provides that, "The marriage of any female ward to a person of full age shall operate as a legal discharge of the guardianship; and the guardian shall be authorized to account to the wife, with the assent of the husband." This certainly is no limitation on the power of the court to appoint a guardian for appellant. She was not married "to a person of full age." Indeed, it has been expressly held that the marriage of a minor female ward to a person who is also under age does not discharge her guardianship. The guardian can make no settlement with her, and the guardianship must continue until either she or her husband is twenty one years old. *State v. Joest*, 46 Ind. 235. The fact, too, that the statute declares that marriage to a man of full age shall operate as a discharge of the

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guardianship, necessarily implies that in case the husband is not of full age the guardianship shall not be discharged. Otherwise the statute would read: The marriage of any female ward shall operate as a legal discharge of the guardianship; and the guardian shall be authorized to account to the wife, with the assent of the husband. This the legislature did not say, for the very good reason that in case the husband were himself a minor he could give no such assent; the estate could not thus be placed in the hands of minors, who, in law, are presumed to be incapable of managing their own estate.

What we have said relates, of course, not to the persons, but to the estates of minors. "Guardianship of the person," as well said by Chief Justice O'Brien, in *Montoya de Antonio v. Miller* (N. M.), 21 L. R. A. 699, 34 Pac. 40, "is absolutely inconsistent with the conjugal rights of husband and wife." But, as the learned chief justice continues, the release from legal guardianship of one's person does not imply the duty of the guardian to surrender, or of the married ward to demand, any property of hers intrusted to him by the law during her minority.

The judgment is affirmed.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO.
v. KEEFER.

[No. 17,560. Filed October 1, 1896.]

CARRIERS.—*Exemption of by Contract, from Liability for Negligence.*—A railroad company cannot, by a contract with a passenger, protect itself from liability resulting from its negligence, while performing a duty it owes to the public as a common carrier. p. 26.
SAME.—*Under Special Contract with Express Company.*—A railroad company in carrying goods for an express company under a special

146	21
149	200

146	21
157	313
157	314
157	315
157	317

146	21
170	99
170	104

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agreement with such company is a private carrier of goods and is not performing a duty as a common carrier. *p. 34.*

SAME—Exemption from Liability by Contract.—A contract between a railroad company and an express company, by which the latter assumed all risks and damages to its messenger while on the railroad, is binding upon an express messenger who entered into a contract with such express company, thereby assuming all risks of accidents and danger incident to such employment, however occasioned, and thereby empowering such company to enter into a contract exempting the railroad company from all liability for injuries to him. *p. 35.*

From the Greene Circuit Court. *Reversed.*

Baker & Daniels and *Davis & Moffett*, for appellant.

Matson & Giles, for appellee.

MONKS, C. J.—Appellant was employed as an express messenger by the American Express Company, which was carrying on the express business over the road of appellant between Bedford and Switz City, Indiana. While so employed and engaged in his usual duties on the express car of said train, the place provided by appellant for him to ride, he was injured by the falling of appellant's railroad bridge, and brought this action against appellant to recover damages therefor. A demurrer to the complaint for want of facts was overruled. Appellant answered in three paragraphs, and appellee's demurrers to the second and third of said paragraphs were sustained. The case was tried by a jury and a verdict returned in favor of appellee, and over a motion for a new trial judgment was rendered against appellant. The action of the court in overruling the demurrer to the complaint and in sustaining the demurrer to the second and third paragraphs of answer is assigned as error. It is first insisted that the court erred in overruling the demurrer to the complaint. While the allegations are not as specific and complete as they should have been made,

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we have concluded that the complaint is sufficient on demurrer.

The third paragraph of answer avers that the appellee was, at the time of the injury, upon the train and in the express car as a messenger of the American Express Company, in charge of its express matter then therein; that he had not paid or tendered fare or compensation for his carriage, nor had he agreed to pay; that his right to be upon the train was secured to him and to the express company by a contract in writing between the railroad company and the express company, and that he was then riding upon the train in pursuance of the contract and not otherwise, and that the only compensation the railroad was to receive was the compensation to be paid by the express company, under the contract for the express privileges granted it thereby. It is also alleged that appellee, in consideration of his employment by the express company, and at the time thereof, executed a contract in writing—which is set out in the answer—in which appellee covenanted and agreed as follows:

“And, whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes. Now, therefore, in consideration of the premises and of my said employment, * * * I do hereby assume all risks of accidents and injuries which I shall meet or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employe of any such corporation or person otherwise, and whether

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resulting in my death or otherwise. And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or of any employe of any person or corporation or otherwise.

“And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do further agree that in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or person owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

“I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreement in so far as the provisions thereof relate to injuries sustained by employes of the company are concerned, as fully as

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if I were a party thereto. And I do hereby authorize and empower said express company at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or person operating any railroad, stage or steamboat line, for my transportation as messenger or employe, free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporation or persons, or of any employe of such corporation or persons or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroads, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons."

That under the contract between the express company and appellant, said express company was granted express privileges and facilities on the railroad lines of appellant, and the express company agreed with appellant that, "It is mutually understood and agreed by and between the parties hereto, that the express company will assume all risks and damages to its property, freight and valuable packages, and also assume all risks and damages to its agents and messengers on the said road."

Appellee insists that a common carrier cannot protect itself by contract from liability for negligence to a person riding as appellee was on appellant's train,

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for the reason that such a contract is void as against public policy.

This is a correct statement of the law in this State where the carrier is at the time performing a duty it owes to the public as a common carrier. A common carrier may, however, become a private carrier or bailee for hire where, as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry. *Railroad Co. v. Lockwood*, 17 Wall, on p. 377; *Coup v. Wabash, etc., R. W. Co.*, 56 Mich. 111, 56 Am. Rep. 374; 22 N. W. 215; *Robertson v. Old Colony, R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482; 31 N. E. 650; *Chicago, etc., R. W. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161.

Was appellant, in the carriage for the express company of goods and appellee its agent in charge thereof, performing a duty as a common carrier, or was it performing a service foreign to its duties as a common carrier, and which it could not have been compelled to perform? Railroad companies are not required by usage or common law to transport the traffic of independent express companies over its lines in the manner in which the traffic is usually carried and handled, and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon their passenger trains. *Sargent v. Boston, etc., R. R. Corp.*, 115 Mass. 416; *Express Cases*, 117, U. S. 1.

In the case last cited, the railroad companies had undertaken to perform for the public the express business, before that time done over the same lines by express companies. The express companies applied for space in the express cars for their goods and messengers, and the railroad companies refused to furnish the space or carry their messengers, and these suits

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were brought to compel the railroad to furnish the desired express facilities. The court held that it was not the duty of railroads to carry the goods and messengers of express companies, and that a railroad in such service was not performing a duty it owed to the public as a common carrier. That such right could only be acquired by an express company by contract with the railroad company. The court, by Mr. Chief Justice Waite, said:

“The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employe of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is ‘express,’ it implies access to the train for the loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as

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possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. * * * * The railroad company performs its whole duty to the public at large and to each individual, when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. * * *

“The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freights are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the rail-

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road companies to furnish express facilities to all alike who demand them."

In the case of *Coup v. Wasbash, etc., R. W. Co., supra*, the plaintiff, the proprietor of a circus, sued the defendant railway company, as a carrier, for injuries to the proprietor's cars and equipment and to persons and animals, received by reason of a collision of two trains on defendant's road while plaintiff's circus train was being hauled over the road under a special contract exempting the railroad company from liability for such injuries, although caused by the negligence of defendant's servants.

The railway company, under the contract, furnished the engines and train crews to transport plaintiff's cars loaded with circus performers, animals, tents, etc., and the contract provided that plaintiff was to pay a certain fixed sum "for the use of said machinery, motive power and men, and the above mentioned privileges," the price "for the run" to each of several cities to be paid at the times named therein. It was stipulated that the defendant did not act, in the premises, "as a carrier," but merely as a "hirer of said machinery, motive power, right-of-way, and of the men to move and work the same," etc. The contract provided that the railway company should not be responsible for injury resulting from its own negligence "in running the cars or otherwise," and provided that two advertising cars of plaintiff should be hauled in defendant's passenger trains. The circus train ran in two "sections." The forward one—for some cause not shown—was stopped and the second section was allowed to collide with it, causing the injuries sued for. It was held that it was legal and proper in such a contract to stipulate that the railroad company should not be responsible for damages caused by its negligence. The court, by Campbell, J., said:

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“Unless this undertaking was one entered into by defendant as a common carrier, there is very little room for controversy. * * * If it was not a contract of common carriage we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier’s contract, if it involved any principle of the law of carriers at all. * * *

“It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his train under such circumstances and on such conditions, and if he could not, *then he could only do so on such terms as defendant saw fit to accept.* * * * We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action.”

A case very similar to the last was the Massachusetts case of *Robertson v. Old Colony R. R. Co., supra*. In that case the plaintiff was an employe of a circus proprietor and sued for injuries received while he was riding over defendant’s road in a car of his employer, which was being hauled under a special contract. The trial court ordered a verdict for defendant. The court, in affirming the case, said:

“Unless the defendant was under a common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover.” The contract provided for hauling the cars of the circus, and the circus proprietor assumed all risk and agreed to “exonerate and save harmless” the defendant “from any and all claims for damages to persons and property.” “This contract,” the court said, “the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier.”

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In *Chicago, etc., R. W. Co. v. Wallace, supra*, the United States Circuit Court of Appeals (7th district), held that when a railroad company by special agreement, hauls the cars and property of a circus over its lines, it is not a common carrier, but is acting outside of its duties as such, and therefore may lawfully contract for entire exemption from liability for its negligence. The court said: "But if the company, in carrying the plaintiffs' property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties are bound by its terms. That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached." See also *Hartford, etc., Ins. Co. v. Chicago, etc., R. W. Co.*, 70 Fed. 201.

In *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633, an express messenger was injured while riding as messenger in a baggage car in a passenger train. The contract by which the express company's freight and messenger were carried provided that the messenger should be in the express car, and that the railroad company would issue to him "a season ticket" at season-ticket rates, being below regular full fare. The contract between the two companies further provided that the express company and its messengers should "assume all risks of accidents and injuries," and that the railroad company should be free and discharged from all claims and demands growing out of any injuries received by the messenger while on the road.

The messenger, at the request of the express company, executed and delivered to the railroad company,

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in pursuance of the agreement between the two companies, an agreement reciting that by the rules of the railroad company passengers were not permitted to ride in the baggage cars, and reciting that the passenger was the holder of a "season ticket" and was an express messenger, and as such desired to ride in the baggage car "for the more convenient dispatch of his business" as such; the agreement then continued "that in consideration of said company allowing him to ride in the baggage cars on its trains, the undersigned will assume all risk of accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding."

The messenger executed this agreement unwillingly, and only because he understood that he could not retain his employment as messenger unless he did execute it. The season ticket prohibited its use for express business, but had stamped upon it a statement that "the holder of this ticket, having released the company from all liability, will be permitted to ride on the baggage car."

There was a notice posted in the baggage car, and the rule it announced was uniformly enforced, that "No passenger will be allowed to ride in the baggage car on any train unless he has signed a release discharging the company from all claims and demands in any way growing out of any accident or injuries while riding in such car," etc. It happened that in this case the injury would not have been received if the messenger had been in the passenger car instead of the express car.

The court held that the contract was binding and worked a release of such injuries as were received by

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reason of the plaintiff's riding in the baggage car. The court said:

"The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See *Railroad Co. v. Lockwood*, 17 Wall. 357; and *Griswold v. New York, etc., R. R. Co.*, 53 Conn. 371, 4 Atl. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger."

In a later case in the same court, *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506, 31 N. E. 652, an express messenger riding in the baggage car under a similar contract and with a similar ticket, was injured in a wreck which involved the whole train, and in which many passengers in the ordinary passenger cars were killed and others injured. The train was derailed by defendant's negligence. The court refers to the case in 147 Mass., and states that the decision was then limited to injuries occasioned by riding in the baggage car, and did not involve the application of the release to injuries otherwise received. The court said:

"This question is now presented to us, and we are of opinion that the contract does include such injuries. The contract, after reciting that the railroad company does not allow passengers to ride in the baggage cars of any of its trains, and that the undersigned (the

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plaintiff) 'is desirous of riding in such car for the more convenient dispatch of his business as an expressman,' proceeds as follows: 'It is understood and agreed that, in consideration of said company allowing him to ride in baggage cars on its trains, the undersigned will assume all risks of accident and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.'

"It seems to us that the nature and fair import of the words used was that the plaintiff should take the risk of all injuries received by him while riding in the baggage car, however arising. The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience. That it was a valid contract cannot be questioned since the decision in *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633. See also *Quimby v. Boston, etc., R. R. Co.*, 150 Mass. 365, 23 N. E. 205."

Under the doctrine declared in the Express Cases, *supra*, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

Appellee, when he went upon the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon

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the train, that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant. *Express Cases, supra; Bates v. Old Colony R. R. Co., supra; Hosmer v. Old Colony R. R. Co., supra.*

The contracts set out in the third paragraph of answer were not in regard to any duties appellant was required to perform as a common carrier, nor did such contracts attempt to limit the liability of appellant for negligence in the discharge of its duties as a common carrier, the same are therefore binding upon all the parties thereto. Appellee by his contract assumed all the dangers of the trip however occasioned, and undertook and agreed to release and discharge appellant from all liability if he in any way should be injured in his person by the negligence of appellant, and authorized and empowered the express company to enter into a contract exempting appellant from all liability for injuries to appellee. The contract of the express company with appellant was therefore binding upon appellee the same as if he had executed it in person. It follows that the court erred in sustaining the demurrer to the third paragraph of answer.

It is not alleged in the second paragraph of answer that the express company or appellee in any contract with appellant ever assumed any risks or damages of any kind, or that the appellant had notice or knowledge of the terms of the agreement between appellee

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and the express company. The mere fact that appellee had entered into the contract alleged with the express company would not entitle appellant to the benefit thereof. The court did not err in sustaining the demurrer to the second paragraph of answer.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this opinion.

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[No. 17,743. Filed October 1, 1896.]

STATUTORY CONSTRUCTION.—*When Grammatical Construction Disregarded.*—Where the legislative sense of a statute is plain, the exact grammatical construction and propriety of language may be disregarded.

SAME.—*Intoxicating Liquors.*—*Grammatical Construction.*—The word “and” in section 10 of the Act of March 11, 1895, which section declares that its provisions shall apply to persons, places, and sales of spirituous, vinous, malt “and” other intoxicating liquors, will be construed as “or,” it being necessary to so construe the word “and” to harmonize said section 10 with the other sections of the statute.

From the Vigo Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *S. M. Huston*, *E. F. Ritter*, *Duncan*, *Smith & Hornbrook*, and *F. E. Matson*, for State.

Lamb & Beasley, *S. R. Hamill*, *Allen Zollars*, *Stuart Bros. & Hammond*, *Elliott & Elliott*, and *Baker & Daniels*, for appellee.

JORDAN, J.—This prosecution is based upon sections 2 and 4 of an act of the General Assembly, approved March 11, 1895, (Acts 1895, p. 248). A state-

146	36
145	443

146	36
153	355

146	36
160	623

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ment of the charges against the appellee was given in the appeal of *State v. Gerhardt*, 145 Ind. 439, and the principal questions herein involved were, in that case, decided adversely to the contentions of counsel for appellee. It is insisted that the information does not sufficiently charge a public offense under either of said sections, for the reason that it alleges only that the defendant "was engaged in the sale of spirituous, vinous, and malt liquors." The contention is that after the words "malt" the words "and other intoxicating liquors" should have been inserted in the information, and that this omission is fatal to the pleading. The insistence is, that as section 10, of the statute in controversy, declares that its provisions "shall apply to persons, places and sales of spirituous, vinous, malt, *and other intoxicating liquors*, whether conducted under the law of the State of Indiana licensing, regulating and restricting the sales of such liquors to be used as a beverage, or by virtue of any laws of the United States," etc.; that the legislature thereby imposed a limitation upon the operation of the law, and hence no prosecution can be maintained, under sections 2 and 4, unless it is made to appear that the accused was engaged in conducting a saloon wherein he sold not only such intoxicating liquors as spirituous, vinous and malt, but in addition to these, other intoxicating liquors. Or, in other words, if the liquor seller was engaged in selling spirituous liquors alone, to be drunk as a beverage, he could not, under the "Nicholson Law," be required to conduct the sales thereof separate from other business, or to exclude devices for amusements from his saloon, or to remove his screens during the times in which intoxicating liquors are prohibited by law.

Upon an examination of the statute as an entirety, the fallacy of appellee's proposition is apparent. It is

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true, as contended, that in section 10 the clause or expression, "*and other intoxicating liquors*," follows immediately after the word "malt," but in the preceding sections, namely, 1, 2, 3, 4, 5, 6, and 9, after the words "spirituous, vinous, malt," the clause "or other intoxicating liquors" invariably follows; "or" being used disjunctively in each particular instance. It is a well recognized canon of interpretation by which courts are guided in the consideration of statutes that where the legislative sense is plain, the exact grammatical construction and propriety of language may be disregarded. In obedience to this rule, courts have frequently interpreted "and" as meaning "or," and *vice versa*. Bishop Statutory Crimes, section 243; Am. and Eng. Ency. of Law, Vol. 1, 569; Id. Vol. 17, 218; Id. Vol. 23, 370.

Another rule controlling the interpretation of statutes is, that all the parts of the same act must be considered together, and if one part, standing by itself, is obscure, its meaning may be disclosed by another part of the same statute. The consideration of the entire act may expand or restrict the terms of some particular clause.

By a comparison of the phrase "*and other intoxicating liquors*," as it appears in section 10, with the other sections to which we have referred, it is clear that in order to arrive at the true legislative intent in which it was employed, it must be read "*or other intoxicating liquors*." That "and" was there used in a disjunctive sense, in like manner as "or" in the antecedent sections. By so holding we harmonize and render section 10 consistent with the others. A construction or interpretation which produces the greatest harmony and the least inconsistency is laid down by the authorities as one of the safe guides to be followed by courts in the consideration of statutes.

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From the conclusion reached it follows that the information is not open to the objections urged by appellee.

No other objections against the information are presented, therefore its sufficiency, in other respects, is not considered.

Judgment reversed.

HORN BROOK v. POWELL ET AL.

[No. 17,969. Filed October 1, 1896.]

HARMLESS ERROR.—*Jury in Cause Triable by Court.*—Where in an action on notes, and to set aside a conveyance as fraudulent, triable by the court, and the jury, called to determine certain questions of fact, were instructed to return a general verdict as to the notes, instead of being directed to find on the particular questions of fact, and the court disregarded the verdict of the jury, the error was harmless.

SAME.—*Swearing of Jury in Cause Triable Only by Court.*—Where in an action, triable only by the court, a jury is called to determine certain questions of fact, and are erroneously sworn to “well and truly try the cause now in hearing,” etc., and the court in rendering judgment disregards the verdict of the jury, and makes a finding for itself on every question, the error, if any, is harmless.

From the Warrick Circuit Court. *Affirmed.*

S. R. Hornbrook, for appellant.

Hatfield & Hemenway and *F. H. Hatfield*, for appellees.

MCCABE, J.—This was a suit founded on two promissory notes, alleged to have been executed by appellee, William Powell, to appellant, and to set aside an alleged fraudulent conveyance of real estate to the appellees, William Powell and Lizzie Powell, his wife, as tenants by entireties. A trial of the issues resulted in

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a finding for the plaintiff as to the notes sued on and interest in the sum of \$206.94 and \$20.00 attorneys' fees, and a finding against the plaintiff as to the alleged fraudulent conveyance, on which finding the court rendered judgment over the plaintiff's motion for a new trial.

Overruling the latter motion is the error assigned.

The ground on which it is contended that the motion for a new trial ought to have been sustained, as stated therein, is that "the court submitted the issues as to the notes to the jury, and they were sworn to try the case as in an action at law."

Under our statute the issues formed upon the complaint were such as are triable by the court without a jury. Section 412, Burns' R. S. 1894 (409, R. S. 1881); *Israel v. Jackson*, 93 Ind. 543; *Hendricks v. Frank*, 86 Ind. 278. The latter part of the section of the statute above referred to empowered the court in its discretion and for its information to submit any question of fact to a jury.

The jury were sworn, over appellant's objection, to "well and truly try the cause now in hearing," etc. The court directed the jury "to find a verdict only upon the issues joined in regard to said promissory notes and answer two interrogatories" submitted by the court. The verdict, interrogatories, and answers thereto are as follows: "We, the jury, find for the plaintiff against William Powell, and assess the plaintiff's damages at the sum of \$206.94 and \$10.00 attorneys' fees. CONSTANTINE HIEUR, Foreman."

Interrogatories: "Was the defendant, William Powell, indebted to his wife for money borrowed from her on the 25th day of May, 1894, when the deed from Mrs. Baker was made to Powell and his wife? Answer. Yes.

"If he was indebted to her was the deed made to

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himself and his wife, by his direction, in consideration and payment of such indebtedness? Answer. Yes.”

And then the record reads: “And having heard the evidence and argument of counsel, and being sufficiently advised by the verdict and answers to interrogatories returned by the jury, and being in all things sufficiently advised in the premises, the court finds there is due the plaintiff on the notes mentioned in his complaint the sum of \$206.94, balance of principal and interest, and the further sum of \$20.00 attorney’s fees, and on the issue as to whether the lands described in the complaint were fraudulently conveyed to the defendants as tenants by the entireties, the court finds for the defendants.”

Then the judgment follows upon this finding.

The answer was, 1, general denial; 2, want of consideration as to the notes sued on, and 3, in confession and avoidance as to the notes sued on.

There are in this record two irregularities complained of. One in swearing the jury to try the case generally, instead of swearing them to try such particular questions of fact as the court for its information might submit to them. *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487. The other was in directing the jury to return a verdict as to the notes. It should have been directed to find upon such particular questions of fact concerning the notes as the court should have specifically directed, instead of directing them to find a verdict as to such notes.

In such case the jury cannot try the case generally, but it must be tried by the court, and the court must make its own finding. *Lake Erie, etc., R. W. Co. v. Griffin et al*, *supra*; *Pence v. Garrison et al.*, 93 Ind. 345; *Israel v. Jackson et al.*, *supra*. The court did make a finding on every question for itself. The court practically disregarded the verdict the jury returned as to the

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notes and made a different finding of its own, because the jury found for the plaintiff \$206.94 and \$10.00 attorneys' fees, while the court found there is due the plaintiff on the notes mentioned \$206.94 and \$20.00 attorneys' fees.

The case of *Israel v. Jackson et al.*, *supra*, was held to be one of exclusive equitable cognizance prior to the code in which the court must try the case, though it might call a jury for its information. After hearing all the evidence in that case, the court discharged the jury without allowing them to make any finding, and the court found for the defendant. This was complained of as error. The court there said: "This suit being in its legal effect an action for relief against an alleged series of fraudulent practices, would have been, prior to the 18th day of June, 1852, a matter of exclusively equitable jurisdiction. Consequently whether any of the questions of fact presented in the cause should be sent to a jury for trial rested entirely in the discretion of the circuit court. For the same reason any verdict which the jury might have returned would only have been for the information of the court and not obligatory upon it, in the final disposition of the cause. The court, therefore, in the exercise of a sound discretion, could have disregarded any verdict which the jury might have rendered in the cause. This is the construction which we have several times placed upon the section of the code set out as above. *Hendricks v. Frank*, 86 Ind. 278; *Lake Erie, etc., R. W. Co. v. Griffin, et al.*, 92 Ind. 487; *Car-michael v. Adams*, 91 Ind. 526; *Pence v. Garrison*, 93 Ind. 345."

The effect of the action of the court in this case in disregarding the verdict of the jury as to the notes upon the rights of the appellant, are no greater than if the court had, at the conclusion of the evidence,

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without permitting them to make any finding upon that question, discharged the jury. That is practically in effect what the court did as to that part of the finding of the jury. The irregularity, if it was an irregularity, of directing them to return a verdict as to a part of the case did not harm appellant, especially as he is not claiming that the court's finding upon that branch of the case was not sustained by the evidence.

While it is true that the jury cannot render a binding verdict in such a case as this, neither is it true that their verdict did bind the court, but on the contrary the court disregarded it. It is also true that the jury ought not to be sworn to try the case generally as they were sworn, but should be sworn to try such particular questions of fact as the court might submit to them. *Israel v. Jackson, supra; Hendricks v. Frank, supra; Lake Erie, etc., R. W. Co. v. Griffin, supra; Carmichael v. Adams, supra; Pence v. Garrison, supra.*

But an oath administered, as the one was in this case, has always been held sufficient to make the answers to interrogatories by the jury valid in other cases without being specially sworn to try the particular questions of fact embraced in such interrogatories. Besides, there is no claim made that the failure to swear the jury to try the particular questions of fact submitted to them by the interrogatories in this case in any way harmed the appellant.

We conclude that both irregularities were harmless, and therefore not material error. The circuit court did not err in overruling the motion for a new trial.

The judgment is affirmed.

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VANDEVENDER ET AL. v. MOORE ET AL.

[No. 17,826. Filed May 7, 1896. Rehearing denied Oct. 1, 1896.]

PRACTICE.—Partition.—Objections to a judgment in partition of lands setting off the portion of one party without any adjudication as to the rights of the other parties must be made by motion to modify such judgment in the trial court. *p. 47.*

JUDICIAL SALE.—Sheriff's Certificate.—Lien.—A certificate of sheriff's sale of real estate confers no title, but is evidence only of a lien. *p. 49.*

SAME.—Rights of Married Women.—Parties.—The wife of a purchaser of lands sold under foreclosure of a mechanic's lien acquires no interest in such lands as against a prior mortgagee thereof, and in an action to foreclose such mortgage it was not necessary to make the wife of the purchaser at the mechanic's lien sale a party defendant. *pp. 50 and 51.*

From the Madison Circuit Court. *Reversed.*

T. B. Orr, for appellants.

Bagot & Bagot, for appellees.

MCCABE, J.—The appellee, Julia A. Moore, and her husband, sued the appellants for partition of and to quiet title in and to real estate consisting of nine acres and a fraction of land in Madison county. The issues formed upon the complaint and cross-complaint were tried by the court without a jury, resulting in a special finding of the facts, on which the court stated a conclusion of law favorable to appellee, Julia A., and thereupon the court rendered judgment quieting her title to the undivided one-third and of partition in her favor; her husband seems to have been made a party simply because he was the husband of the plaintiff. The only error assigned is upon the conclusion of law stated by the court.

The substance of the special finding is to the effect that, in May, 1891, Decatur Vandevender was the owner of the legal title of the land, describing it, and

146	44
148	629
150	267
150	408

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158	807

146	44
170	313

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at the same time one Charles Orvis owned the equitable title. And at the same time, Niece & Niece held a mechanic's lien against said real estate; that, on December 3, 1891, said Vandevender and wife conveyed said land to said Orvis, and thereupon on the same day said Orvis and wife mortgaged back to said Vandevender said land to secure notes for the purchase-money, aggregating \$4,048.00, which mortgage was duly recorded December 7, 1891; that, on June 11, 1891, said Niece & Niece foreclosed their mechanic's lien in the Madison Circuit Court, making defendants therein said Vandevender, Orvis, and others, the judgment amounting to \$181.00 and costs; that on August 6, 1892, said land was sold by the sheriff of said county on the last named decree to said Samuel P. Moore for \$218.30, the amount of the decree and costs. No redemption from said sale having been made, on August 7, 1893, said sheriff executed to said Samuel P. Moore, a deed pursuant to his certificate issued to said Moore on the sale aforesaid; that during all the time mentioned above, and ever since, appellee, Julia A. Moore, was and is the wife of appellee, Samuel P. Moore; that on March 13, 1893, said Vandevender obtained a decree in the Madison Circuit Court foreclosing his mortgage for \$4,475.72, making Orvis and wife, Samuel P. Moore and others, defendants, but did not make appellee, Julia A. Moore, a party in any way; that in said last named decree the court specially found and adjudged that said Samuel P. Moore had and held a lien, evidenced by the sheriff's certificate aforesaid, which lien was further found and adjudged to be junior and subsequent to the lien of the mortgage of said Vandevender; that on April 22, 1893, the sheriff of said county sold said real estate to said Vandevender for \$2,200.00 on a precept duly issued to him on said last named decree, and issued to

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said purchaser a certificate of such sale; and no redemption having been made from said sale, said sheriff, on April 23, 1894, executed a conveyance of said real estate to said Vandevender, pursuant to said sale and certificate aforesaid; that the rental value of said real estate for the year 1893 was \$20.00; that Vandevender has paid all the taxes, amounting to \$20.00; that Vandevender had full possession of the real estate, and that no conveyances have been made by either of the parties since those already mentioned; that a reasonable attorney's fee for plaintiff's attorney is \$100.00, and that said real estate is worth less than \$10,000.00.

The conclusion of law is: "That Julia A. Moore is the owner of one-third in fee and entitled to have partition of the same, and recover of said defendant Vandevender \$6.66, less the taxes which he has paid thereon \$6.66."

The conclusion of law is so general that it is difficult to determine what was the legal conclusion, or rather, it involves several legal conclusions.

It will be observed that the facts found show that the mechanic's lien was older than the mortgage, and therefore the sheriff's sale and deed thereunder, in the absence of other facts, vested title in Samuel P. Moore, the purchaser thereunder, paramount and superior to the title vested in Vandevender by his purchase at his foreclosure sale under his mortgage. That being so, it is difficult to see how Julia A. Moore, wife of Samuel P., became vested with any other interest therein than that of an inchoate or contingent interest, which has not as yet, and may never, ripen into any actual interest whatever.

Because, if the facts last mentioned are uncontrolled by the other facts found, Samuel P. Moore is the owner in fee-simple of all the land, and his wife,

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Julia A., has no fee-simple interest in any part of the land, nor any other interest which can be the subject of partition (Burns' R. S. 1894, sections 1200, 1201, R. S. 1881, 1186, 1187), or of an action to quiet title Burns' R. S. 1894, section 1082 (R. S. 1881, 1070).

The judgment in this case quiets the title in Julia A. in the undivided one-third of the land and awards partition in her favor without any showing who owns the other two-thirds. It is difficult to comprehend on what ground a partition judgment can rest where land is only set off to one of the parties without any adjudication as to the rights of the other parties, or as to who is entitled to the balance of the land. However, this is such an objection as must be taken by a motion in the trial court to modify which was not done.

It seems probable that the rights of Julia A. Moore so engrossed the minds of the court and counsel that the rights of the appellant Vandevender in the balance of the land, which were not in controversy, were overlooked or entirely forgotten.

But it is conceded by the appellee's counsel that, under all the facts found, Vandevender's purchase at sheriff's sale under his foreclosure decree vested in him title paramount and superior to the title vested in Samuel P. Moore under his purchase at sheriff's sale on the decree foreclosing the Nieces' mechanic's lien.

That concession rests upon the fact that in the foreclosure of his mortgage by Vandevender it was specially found and adjudged that Samuel P. Moore held a lien by virtue of his certificate of sheriff's sale on the mechanic's lien foreclosure, and that Vandevender's mortgage lien was prior and superior thereto.

It has been held by this court, and we think correctly, that a decree of foreclosure of a junior lien

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wherein it is adjudged that such lien is senior to another lien, is conclusive between the parties. *Harrison v. Phoenix Ins. Co. et al.*, 83 Ind. 575; *Jones v. Vert*, 121 Ind. 140; *Ulrich v. Drischell*, 88 Ind. 354; *Barton v. Anderson*, 104 Ind. 578; *First Nat. Bank v. Hendricks*, 134 Ind. 361.

So then, so far as the law of the case now before us is concerned, it is to be taken as a fact conclusively established by the special finding of facts, that the lien of Vandevender's mortgage was prior and superior to the lien of the mechanic's lien under which Moore purchased. Whether this or the contrary was the legal opinion of the trial court we have no means of knowing on account of the court having stated its conclusion of law in terms too general and indefinite.

From the briefs of counsel on both sides, and other circumstances, it is probable that the trial court held the same views we have expressed as to the conclusive priority of the lien of Vandevender's mortgage.

And it is further rendered probable by the briefs and other circumstances that the court meant, by its conclusion of law, that the purchase by Samuel P. Moore at sheriff's sale, and the sheriff's deed under the mechanic's lien foreclosure, vested in him the title, and the failure to make his wife, Julia A., a defendant in the foreclosure suit by Vandevender brought her within the provisions of the act of 1875, concerning the rights of married women in the real estate of their husband's sold at judicial sales. That act provides that "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a

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married woman now become absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs and assigns, subject to the provisions of this act, and not otherwise," and then it provides for partition by the wife. Burns' R. S. 1894, section 2669 (R. S. 1881, 2508).

Counsel on both sides have argued the question as if it depended on the fact whether Samuel P. Moore's certificate of purchase constituted a mere lien or an equitable title, and great importance is attached to the fact by the appellant's counsel that the year for redemption from Moore's purchase had not expired when Vandevender purchased at his foreclosure sale. It is argued by the appellant that for that reason Moore's certificate being only a lien and no title, his wife, Julia A., had not even a contingent interest, hence not necessary to make her a party to Vandevender's foreclosure of his mortgage. It is well settled that a certificate of sheriff's sale of real estate confers no title, but is evidence only of a lien. *Robertson v. Van Cleave*, 129 Ind. 217, 15 L. R. A. 68, and authorities cited.

On the other hand, the appellee concedes that the sheriff's certificate of sale did not constitute title, and did not vest title in Samuel P. Moore, but evidenced only a lien capable of ripening into title in case there was no redemption within one year; but she contends that when the year expired without redemption, and the sheriff's deed was executed to her husband, it related back to the date of the sheriff's sale to him, and that, as the finding shows, antedated the foreclosure of Vandevender's mortgage. And hence, it is argued, that when appellant Vande-

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vender's mortgage was foreclosed, the absolute title by such relation vested in Samuel P. Moore, and hence his wife had an inchoate interest in the land, and she, not having been made a party, and such interest not having been directed to be sold or barred in the decree, she now is authorized by the statute quoted to assert that right by a suit for partition.

Counsel for appellee cite in support of this contention decisions of this court to the effect, and we think they state the law, that on a judicial sale of real estate owned by a married man his wife's inchoate interest becomes absolute and vested in her when the deed is executed to the purchaser, and by relation it reaches back to the date of the sheriff's sale, and is in effect the same as if her title became absolute at the date of the sheriff's sale. *Elliott v. Cale et al.*, 113 Ind. 383; *Elliott v. Cale*, 80 Ind. 285; *Hollenback v. Blackmore*, 70 Ind. 234; *Riley v. Davis*, 83 Ind. 1; *Summit v. Ellett*, 88 Ind. 227; *Currier v. Elliott*, 141 Ind. 394.

But a more serious question arises back of that in this case, and which must be determined in favor of the appellee before any interest could vest in Samuel P. Moore, the purchaser at the mechanic's lien foreclosure sale, and hence before any contingent interest could vest in his wife, Julia A.

And that question is, whether Samuel P. Moore, by his purchase ever acquired any interest in the land as against Vandevender's title, derived through his purchase and sheriff's deed on his foreclosure decree.

This question does not seem to have attracted the attention of counsel on either side, but it confronts us, and its decision one way or the other is absolutely necessary to a decision of the case.

As before observed, the priority of Vandevender's mortgage over the Niece mechanic's lien was conclu-

sively established by Vandevender's foreclosure decree.

Therefore, when Moore purchased under the mechanic's lien foreclosure he bought subject to Vandevender's mortgage. As against such mortgage, neither Moore nor his wife acquired any interest in the land by his purchase. *Kissel v. Eaton*, 64 Ind. 248.

It was held in the case just cited that the wife of the grantee of lands encumbered by a mortgage has no inchoate interest in the lands as against the mortgagee. That was suit for partition precisely like this. It was said there by Worden, J., speaking for the court, that: "When the land was conveyed by Anderson and his wife to Peter Kissel, it was encumbered by a mortgage which Anderson and his wife had executed to Espy. The plaintiff, as the wife of Peter Kissel, never acquired any inchoate interest in the land that was not subject to that mortgage. As against the mortgagee she never had any interest in the land, inchoate or otherwise." *Butler v. Thornburgh*, *Admr.*, 141 Ind. 152.

The reasons that lie at the foundation of this decision are, that the foreclosure of a mortgage does not extinguish the lien, but operates as a continuation thereof from the date of its creation. *Lapping v. Duffy*, 47 Ind. 51; *Evansville Gas-Light Co. v. State, ex rel.*, 73 Ind. 219. And a purchaser at a sheriff's sale occupies the same position as if he had purchased the land from the debtor at the same date as that on which the judgment was rendered or the lien of the mortgage attached. *Paxton v. Sterne et al.*, 127 Ind. 289, and cases there cited; *Merritt v. Richey*, 127 Ind. 400; *Orth v. Jennings*, 8 Blackf. 420.

It follows, from what we have said, that appellee, Julia A. Moore, never acquired any interest in the land in question as against the title of appellant, Van-

Groff v. Clark.

devender, derived through the foreclosure of his mortgage, purchase, and sheriff's deed thereunder.

The judgment is reversed and the cause remanded, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of the appellant, Vandevender.

GROFF v. CLARK.

[No. 17,758. Filed October 2, 1896.]

HARMLESS ERROR.—*Appeal.—Elections.*—Where in an election contest, the election returns showed that contestee had received a majority of four votes, it was harmless error to exclude evidence tending to show that two of the votes cast for the contestee were illegal.

From the Marion Circuit Court. *Affirmed.*

Merrill Moores and Harding & Hovey, for appellant.

McCullough & Spaan, for appellee.

HACKNEY, J.—The appellant, Groff, and the appellee, Clark, were opposing candidates for the office of township trustee of Wayne Township, Marion county. The election returns showed that Clark received four votes more than were cast for Groff. Groff contested Clark's election upon the ground that forty-three of the votes cast for him were by inmates of the county poor asylum, which asylum was located in precinct numbered nine, of the township named, and the persons so voting had become such inmates from townships, cities, towns and precincts other than the precinct in which said asylum was located. The evidence disclosed that many inmates of said asylum cast votes at said election in said precinct, and that many of

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them went to the asylum from without said precinct. It was proposed to prove, on behalf of the appellant, in one instance, by a clerk of the election board who assisted in preparing the ticket voted by an inmate, that such ticket was voted for the appellee, and, in another instance, by an inmate, that he voted for the appellee. In each instance the trial court sustained the appellee's objection to the offered evidence.

Said two rulings are the only rulings complained of in this court, and the two named were the only instances in which the appellant offered evidence as to the candidate for whom any of said inmates voted.

It will be observed that if it be conceded that the two votes thus questioned were illegal and were cast for the appellant, the appellee would still have held a majority of two votes. If, therefore, the two rulings complained of were admitted to have been erroneous, it is manifest that they were not prejudicial to the appellant.

"The only errors which will warrant the reversal of a judgment are such as affirmatively appear to have prejudiced the substantial rights of the party appealing." Woolen's Digest, Vol. 1, p. 585; *Morningstar v. Musser*, 129 Ind. 470; *Chicago, etc., R. W. Co. v. Hunter*, 128 Ind. 213; *Rogers v. Leyden*, 127 Ind. 50; *Sego v. Stoddard*, 136 Ind. 297, 22 L. R. A. 468.

In the latter case, two ballots were in question, but this court, finding that to pass upon them they could not change the result, held that their rejection by the trial court could constitute no available error.

If we should presume in favor of the offer to prove, in the two instances named, we could find no justification in holding that others of those who voted, it may be illegally, voted for the appellee. We conclude, therefore, that the record presents no prejudicial or avail-

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able error, and the judgment of the lower court is affirmed.

WESTERN UNION TELEGRAPH CO. v. THE STATE.

[No. 17,831. Filed October 2, 1896.]

PLEADING.—*Answer Out of Record is not Brought in by Mere Reference Thereto in a Subsequent Pleading.*—An original answer which has been taken out of the record, by the court sustaining a demurrer thereto, cannot be brought into an answer to a supplemental complaint by merely referring thereto and adopting the same as a part thereof. *p. 57.*

TELEGRAPH COMPANIES.—*Collection of Taxes by Suit in Name of State.*—*Injunction.*—An injunction restraining county auditors and county treasurers from collecting taxes assessed against a telegraph company, does not prevent an action to recover the same in the name of the State, under section 8488 Burns' R. S. 1894. *p. 58.*

SAME.—*Taxation.*—*Penalty.*—*Constitutional Law.*—Section 11, Act of March 6, 1893 (8488, Burns' R. S. 1894), providing that if a telegraph company refuse to pay the taxes assessed against it, an action for the collection thereof may be maintained in the name of the State by the Attorney-General, and the judgment shall include a penalty of fifty per cent. of the amount of the taxes is constitutional. *pp. 61-63.*

From the Marion Circuit Court. *Affirmed.*

Chambers, Pickens & Moores and Brown & Wells,
for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores,*
L. O. Bailey, and *Smith & Korbly,* for State.

HOWARD, J.—This was an action by the State for the collection of taxes due by the appellant. It was brought under provisions of section 11 of an act supplementary to and amendatory of the general tax law of 1891, and providing for the taxation of telegraph, telephone, express and other like corporations, approved March 6, 1893. Acts 1893, p. 381; Burns' R. S. 1894, section 8488.

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The section reads as follows:

“Sec. 11. In case any such association, co-partnership or corporation as named in this supplemental and amendatory act shall fail or refuse to pay any taxes assessed against it in any county or township in the State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the prosecuting attorneys of the different judicial circuits of the State, on the relation of the auditors of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent. of the amount of taxes so assessed and unpaid, together with reasonable attorney’s fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, co-partnership or corporation shall extend, or in any county where such association, company, co-partnership or corporation shall have an office or agent for the transaction of business. In case such association, company, co-partnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said state board of tax commissioners, or in case such association, company, co-partnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the Attorney-General may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in

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any such suit or suits, shall be by said Auditor of State accounted for as a credit to the respective counties for or on account of which such collections were made by said Auditor of State, at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State; and upon such settlement being made, the treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: *Provided, however,* That in any such action the amount of the assessment fixed by said state board of tax commissioners and apportioned to such county, or apportioned by the county auditor to any particular township, shall not be controverted."

The original complaint was filed by the Attorney-General, May 7, 1894, and was for the collection of the taxes then remaining due by the appellant for the year 1893, in the several counties of the State in which the company owned property subject to taxation under said act. The answer to this complaint, which was not filed until January 12, 1895, was an elaborate and detailed attack upon the validity of the law. A demurrer was sustained thereto, June 11, 1895.

In relation to this answer, the following admission is made in appellant's brief: "The allegations of the answer to the original complaint are, in substance, the same as the allegations in the telegraph company's complaint in the suit of the company against Taggart *et al.*, as auditors and treasurers of the various counties in the State, changed so as to constitute an answer."

As the contentions of the company in the suit referred to against Taggart *et al.* were overthrown,

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and the validity of the law sustained, both in this court and in the Supreme Court of the United States, we may consider the decisions so rendered a sufficient reply to the argument here repeated against the constitutionality of the law. *W. U. Tel. Co. v. Taggart*, 141 Ind. 281; same, 163 U. S. 1. That the proceedings before the state board of tax commissioners were in all respects regular also follows; for it is expressly admitted in the answer that in assessing appellant's property the state board proceeded in accordance with the requirements of the law so upheld.

On the same day on which the demurrer to the answer to the original complaint was sustained, that is, June 11, 1895, the Attorney-General, by leave of court, filed a supplemental complaint for the collection of appellant's taxes for 1894, those taxes having also become due and being then unpaid. To this supplemental complaint a demurrer was overruled on June 22, 1895. An answer to the supplemental complaint was filed June 27, 1895; and, on September 3, 1895, a demurrer was sustained to the answer.

In the first paragraph of the answer to the supplemental complaint, it is said: "The defendant for answer to the supplemental complaint herein, adopts and makes a part hereof all the allegations of the answer to the complaint herein not specially relating to the assessment and collection of taxes for the year 1893, except as herein differently alleged." Since this answer to the supplemental complaint was filed June 27, 1895, and since the answer to the original complaint had then been taken out by the sustaining of the demurrer thereto, on June 11, 1895, it would seem that the first answer could not thus be brought into the second by reference, as here attempted. Except as to the correctness of the ruling on demurrer, the first answer was wholly out of the record at the time when

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the second answer was filed. In addition, as we have already seen, the decision in the case of *W. U. Tel Co. v. Taggart, supra*, shows the first answer to have been bad.

In the answer to the original complaint it was specially averred, that, on the 19th day of December, 1893, that is, before the bringing of this action, the appellant had brought the suit in the case of *W. U. Tel. Co. v. Taggart, supra*, to enjoin the county auditors and treasurers of the several counties in which the appellant owned property, from proceeding to collect the taxes herein sued for; and that, while the injunction prayed for was denied, both in the trial court and in this court, yet that a temporary injunction was granted in each of the said courts until the final decision of the case, in the successive appeals taken therein, and that such temporary injunction was still in force at the time of filing said answer.

In the answer to the supplemental complaint, a similar averment was made as to an injunction granted in the circuit court of the United States for the district of Indiana, prohibiting the Auditor of State from certifying to the several county auditors the valuations of appellant's property as made by the state board of tax commissioners for the year 1894. *W. U. Tel. Co. v. Henderson*, 68 Fed. 588.

Those averments were not made by way of pleas in abatement as to other suits pending in relation to the collection of the taxes for which this suit was brought. Neither did the averments show that the injunctions against the officers named had been in any way violated. But the intention seems to have been to argue that, in some manner not shown, the State of Indiana, the plaintiff in the case at bar, had been, in such other suits, enjoined from bringing her action in this case for the collection of the overdue taxes.

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In so far as the action in the United States court is concerned, it is enough to say that the court could not, and did not assume, to have any jurisdiction to enjoin any action on the part of the State. As to the restraining order granted in the trial court, and continued in this court, in the case of *W. U. Tel. Co. v. Taggart, supra*, that had relation to county auditors and county treasurers. No attempt was made, or could be made, to control the action of the State, provided the law afforded her any remedy independent of the action of the officers against whom the restraining orders had been issued.

But the statute under consideration did furnish the State an additional and independent remedy for the collection of the taxes due her. It is provided, in section 11, as we have seen, that in case any such corporation "shall fail or refuse to pay any taxes assessed against it * * * in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana" for the collection of such taxes, by the prosecuting attorney or the Attorney-General, according to the respective jurisdictions of these officers. In instituting this action, the Attorney-General merely availed himself of the power given the State by the law itself. It will not be questioned that the emergency had arisen which was contemplated in the statute: the appellant company had failed and refused to pay the taxes assessed against it, and which were overdue; the action for their collection might therefore be prosecuted in the name of the State. And this is what was done.

There is good reason, too, for the additional remedy thus given. The general tax law contemplates the payment of all taxes in the year succeeding their assessment, easing such payment by providing that it may be made in two installments. A possibility of de-

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linquency is also provided for, but only for one year longer; and for the first six months of delinquency a penalty of ten per cent. is fixed, to be increased to sixteen per cent. for the second six months of delinquency.

It has been held that the law does not provide for interest on such delinquent taxes, but only the penalties named. *Evansville, etc., R. R. Co. v. West, Treas., et al.*, 139 Ind. 254. There remain, therefore, in general, only the provisions for distress and sale of property, in order, finally, to make collection of taxes from dilatory, obdurate or dishonest taxpayers. But the property of telegraph and other corporations provided for in this act, is of such a nature that it, or a part of it, cannot be sold for the payment of taxes without manifest inconvenience to the public. Receivers may be appointed and other appropriate measures taken for the collection of debts due by such corporations, but only in such manner that their business, in which the public and the State have a vital interest, may not be interrupted. *Louisville, etc., R. W. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435; *W. U. Tel. Co. v. Massachusetts*, 125 U. S., at p. 554.

The legislature, in its wisdom, conceived that for such properties it was advisable that there should be provision that collection might be made by suit, with appropriate penalties, so that a judgment might stand against the delinquent, to bear interest until such time as the debt might be paid, or might be collected in receivership proceedings or otherwise. In this way the public treasury might, in some degree, be compensated for the loss of the use of its revenues, caused by the failure to pay taxes when due. The properties being of a special and peculiar class, special remedies are appropriate to bring about that equality required in the assessment and collection of taxes. All author-

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ities concede that classification for purposes of taxation is not only permissible, but even necessary. *Home Ins. Co. v. New York*, 134 U. S. 594; *Charlotte, etc., R. R. Co. v. Gibbes*, 142 U. S. 386; *Cleveland, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 537; *Commonwealth v. Delaware Div. Canal Co. (Pa.)*, 2 L. R. A. 798, 16 Atl. 584.

In the last cited authority, it is well said: "The power to impose taxes for the support of the government, subject to the limitations of the Constitution, still belongs to the Legislature; the selection of the subjects, their classification and the methods of collection are purely legislative matters. When the action of the Legislature, with respect to these matters, is not repugnant to the Constitution, it would certainly be a case of the grossest inequality, which would call for the intervention of the courts. * * *

"It may be conceded, however, that classification should be made according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation. * * *

"Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provisions; * * * even when there may be some disparity of results, if uniformity is the purpose of the Legislature, there is a substantial compliance. * * * Nor is classification necessarily based upon any essential differences in the nature or, indeed, the condition of the various sub-

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jects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results; or it may be based upon well grounded considerations of public policy.”

Indeed, in our own tax law, it has been found necessary, in order to secure just and uniform results, to classify the property of the State into no less than twelve distinct divisions, differing in various respects, according to the nature of the property, as to the modes of assessment or the modes of collection of the taxes thereon. The object in each case, however, has been to secure uniformity in the rate and assessment of the taxes, that all may pay in the same proportion upon the true cash value in each case.

Appellant makes particular complaint of the fifty per cent. penalty provided for in suits under the statute. What we have said as to the nature of appellant's property, and the difficulty in coercing payment of delinquent taxes due thereon, will fully answer this objection. In the sale and redemption of other forms of property, in case of delinquency, there is often quite as heavy a penalty imposed before the property is finally relieved from the paramount tax lien. By section 56 of the general tax law (section 8466, Burns' R. S. 1894), the county auditor is required to add fifty per cent. to the valuation in case the property-owner has refused to list his property or subscribe to the oaths required. The validity of a similar penalty was upheld in *Boyer v. Jones et al.*, 14 Ind. 354. Other like penalties and heavy charges are imposed in different sections of the tax law, where the property-holder has been neglectful or otherwise at fault in matters relating to the assessment or payment of his taxes. See numerous provisions of the tax law as to penalties,

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costs of redemption, etc., resulting from failure to pay taxes when due. Sections 150 to 225 of the general tax law of 1891 (section 8568-8643, Burns' R. S. 1894).

In the event that one is called upon to pay a tax which he believes to be illegal, he has two courses open to him. He may resist payment at the hazard of all penalties in case the decision shall be against him; or he may pay the tax under protest, and then, in case the decision is in his favor, demand the return of his money. See *Rumford Chemical Works v. Ray* (R. I.), 34 Atl. 814. No one need pay any penalty except through his own wrongful act.

The government is in need of its revenues, and these revenues will be paid promptly by all good citizens. In case of failure to comply with such duty, such penalties will be imposed as will, in the judgment of the law-making power, best compel compliance with the law in each case, to the end that all the property-owners of the State may bear their equal share of the public burden. Such penalties, as we have seen, are never imposed upon those that pay their taxes when due; the imposition of the penalty being an effort on the part of the law-makers to compel good citizenship on the part of all taxpayers, that none may shirk the common duty. The validity of the penalty here complained of has, besides, been already affirmed by this court in the case of *State v. Adams Express Co. et al.*, 144 Ind. 549.

Other questions discussed by counsel have, we think, been sufficiently considered by us in this and other cases recently decided. Indeed, in view of the decisions of this court and of the Supreme Court of the United States in relation to our present tax laws, we can find no merit in this appeal. There should be an end to litigation.

The judgment is affirmed.

White et al. v. Prifogle et al.

WHITE ET AL. v. PRIFOGLER ET AL.

[No. 17,817. Filed June 19, 1896. Rehearing denied Oct. 13, 1896.]

LIQUOR LICENSE.—Remonstrance.—Right of Remonstrators to Withdraw Their Names.—Under section 9, Acts 1895 (Acts 1895, p. 248), providing for the filing of a remonstrance against the granting of a liquor license, remonstrators have no right to withdraw their names from the remonstrance after the beginning of the three days' period when the remonstrance is required to be on file, which begins on Friday next preceding the Monday on which a regular session of the board of commissioners begins.

From the Union Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *T. D. Evans*, *J. W. Connaway*, *E. F. Ritter*, *Duncan*, *Smith & Hornbrook*, and *F. E. Matson*, for appellants.

G. W. Pigman, *R. E. Barnhart*, *Reuben Conner*, *L. H. Stanford*, *Lamb & Beasley*, *S. R. Hamill*, *Baker & Daniels*, *Stuart Bros. & Hammond*, *Zollars & Worden* and *Elliott & Elliott*, for appellees.

JORDAN, J.—The point presented by this appeal for our decision, is the action of the lower court in sustaining the right of certain remonstrators who had joined in a remonstrance under section 9 of the act of 1895 (Acts 1895, p. 248), against granting a license to appellee Prifogle to sell intoxicating liquors, to withdraw their names from the remonstrance, after the beginning of the three days' period, fixed by the statute, and thereby reduce the number of remonstrators below that required by law. This question, in the case of the *State v. Gerhardt*, 145 Ind. 439, was decided in favor of the contention of appellants herein, and is decisive of the one here presented.

For error of the trial court, in its holding upon this

146	64
146	612
146	64
154	124
146	64
158	594
146	64
160	876

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question, the judgment is reversed and the cause remanded.

ON PETITION FOR REHEARING.

JORDAN, J.—Appellee asks for a rehearing in this cause, and insists that we were wrong in holding that the trial court erred in sustaining the action of the remonstrators in withdrawing their names from the remonstrance.

Appellee made his application for a license to sell intoxicating liquors at the September term, 1895, of the board of commissioners of the county of Union. His counsel concede in their brief that it fully appears from the record that these remonstrators did not attempt to exercise their right to withdraw therefrom until Friday, August 30, 1895. This was too late for the remonstrators, under the law, to withdraw their names from the remonstrance which was then on file in the County Auditor's office. The Friday immediately preceding the Monday on which a regular session of the board of commissioners begins, is the last day upon which a remonstrance under section 9 of the act of 1895 (Acts of 1895, p. 248), can be filed against an application made at that session for a license to retail intoxicating liquors. *Flynn v. Taylor*, 145 Ind. 533. It follows therefore that the preceding Friday is the first day of the three days' period, and we held in *State v. Gerhardt*, 145 Ind. 439, that if the right to withdraw from a remonstrance was not exercised prior to the beginning of the first day of this period, that it no longer existed. It is further shown by the bill of exceptions that after these voters had been by the court permitted to withdraw from the remonstrance, that thereby the number remaining thereon was reduced below the required majority, and for this

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reason the court, on motion of the appellee, over the objections and exceptions of appellants, struck out and dismissed the remonstrance, and by its judgment granted a license to appellee.

It is also substantially stated in the bill that the right of these persons to withdraw was the "only question submitted to the court at said time for its determination," and that the court "adjudged that said parties had the right and power to withdraw from said remonstrance, to which action of the court the defendants excepted." While the record is somewhat in confusion, and does not present all the questions as it should, and by no means can it be accepted as a model, however, notwithstanding the objections of counsel for appellee, we think it may be held that it at least presents for our consideration the action of the trial court in adjudging that the remonstrators in question had the right to withdraw on the day stated.

Petition overruled.

CITY OF SHELBYVILLE v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

[No. 17,832. Filed October 13, 1896.]

MUNICIPAL CORPORATIONS.—*Powers Delegated to Cities by Legislature.*—*Limitation of Powers.*—*Lights at Street and Railroad Crossings.*—A statute empowering a city to require all railroad companies to maintain lights similar to those maintained by such city at streets crossed by their tracks, will authorize the passage of an ordinance providing for electric lights, where the city maintains electric lights, but not for lights of the "arc pattern." p. 73.

SAME.—*Ordinance Requiring Railroad Companies to Maintain Lights at Streets Crossed by Its Tracks.*—An ordinance requiring railroad companies to maintain a light at all places where its tracks cross a street "on the same schedule plan adopted and used by said city," and imposing a fine for each night where there is a

146	66
146	492
147	979
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148	28
148	66
164	77
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146	66
165	274

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failure to provide the specified light, is bad for its failure to fix definitely the times of lighting. p. 74.

SAME.—Public Safety.—Lights at Railroad and Street Crossings.—Statute Construed.—Section 5173, Burns' R. S. 1894 (Acts 1893, p. 302) authorizing cities to provide by ordinance for the security and safety of citizens and others from the running of trains through cities by requiring railroad companies to keep and maintain lights at points where the tracks cross a street, on all nights that the common council may direct, does not authorize the passage of an ordinance requiring railroad companies to maintain a light at every street and railroad crossing whether or not the security and safety of the citizens require it. p. 74.

SAME.—Exercise of Power Conferred by Legislature.—Where the power granted by the legislature to a city is general, and the manner of the exercise thereof left to the discretion of the city, an ordinance passed in pursuance thereof must be a reasonable exercise of the power granted. p. 69.

PRACTICE.—City Ordinance.—Overruling a demurrer to an answer setting up the invalidity of an ordinance is in effect holding the ordinance invalid. p. 69.

From the Shelby Circuit Court. *Affirmed.*

D. L. Wilson, for appellant.

Elliott & Elliott and *Adams & Carter*, for appellee.

HOWARD, J.—In 1893 the legislature of this State enacted the following statute:

“An act prescribing the duties and powers of common councils of cities in relation to requiring railroad companies to keep and maintain lights at street and railroad crossings in cities, and declaring an emergency.

Approved March 4, 1893.

“Section 1. Be it enacted by the General Assembly of the State of Indiana, that the common councils of all cities of this State, not working under a special charter granted by the legislature of the State of In-

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diana, shall have the power to provide by ordinance or resolution for the security and safety of citizens and other persons from the running of trains through any city by requiring railroad companies running and operating a railroad through any city to keep and maintain lights on all nights that the common council may direct, at the points where the railroad tracks cross a street in any city, and may in such ordinance or resolution provide what kind of lights the railroad company shall maintain, and the manner of enforcing the compliance with the said resolution or ordinance by the railroad company, and for that purpose shall have power to pass and enforce a penal ordinance: *Provided*, That no city shall have authority under this act to pass any resolution or ordinance requiring any railroad company to maintain any different kinds of lights than that maintained by said city." Acts 1893, p. 302 (Burns' R. S. 1894, section 5173).

Under the provisions of this act, the appellant city passed an ordinance, of which we need set out only the title, preamble and first section, which are as follows:

"An ordinance requiring railroad companies to keep and maintain an electric light wherever a track of a railroad company crosses a public street, in the city of Shelbyville, Indiana.

"Whereas, it is necessary for the security and safety of citizens and other persons from the running of trains through the city of Shelbyville, by railroad companies running and operating a railroad through said city; that an electric light be kept and maintained as hereinafter directed, wherever the track of such railroad company crosses a public street in said city.

"Now, therefore,

"Section 1. Be it ordained by the common council of the city of Shelbyville, Indiana, that it shall here-

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after be the duty of every railroad company, running and operating a railroad through said city, to keep and maintain an electric light, wherever a track of such railroad company crosses a public street in said city; all such electric lights shall be of the arc pattern and of the same candle-power as the arc lights used by said city for street lighting. The lighting of all said lights shall be on the same schedule plan adopted and used by said city for its street lighting.

“Every railroad company failing or neglecting to keep and maintain lights, as hereinbefore provided, shall be fined in any sum not exceeding \$10.00 for each night wherein they neglect to provide such lights as herein specified.”

In an action against the company for a violation of the ordinance, the court, by overruling appellant's demurrer to an answer by the company setting up the invalidity of the ordinance, in effect, held the ordinance to be void.

Counsel for appellee, in seeking to uphold this action of the court, contend that the statute above set out gave the city no power to pass the ordinance in question; and that the attempt to pass the ordinance was not a reasonable exercise of the power delegated by the legislature. There is but little difference between these contentions. If there was an unreasonable exercise of power on the part of the city, that is but saying that the city was without power to do what was attempted. In either case the ordinance would be without validity. If, however, as counsel for appellant contend, the ordinance was a valid exercise of the power granted, and the act granting the power was itself constitutional, then there can be no question as to the reasonableness of the ordinance. Any ordinance duly passed in pursuance of lawful power

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delegated by the legislature to the city cannot be unreasonable. *A Coal-Float v. City of Jeffersonville*, 112 Ind. 15; *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426; *Steffy v. Town of Monroe City*, 135 Ind. 466; *Champer v. City of Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390.

In and of itself, the city had no power to pass the ordinance. As said in the last case above cited, "municipal corporations have such powers only as are conferred upon them by the act of the legislature creating them, and such incidental powers as are implied by their creation and as are essential for the accomplishment of the purposes of their creation and for their continued existence."

It is said in 1 Dill. Munic. Corp. (4th ed.), section 328: "Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." And see, further, same authority, sections 319-330, and notes.

It therefore becomes necessary to inquire whether, in the case at bar, the act of the legislature gave to

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the city power to pass the ordinance in question, in manner and form as it stands; and if the mode of the exercise of the power is not prescribed in the act, whether the mode pursued in the ordinance is reasonably calculated to carry out the legislative intent. The ultimate question is one of power, that is, whether the statute authorized the provisions found in the ordinance.

The act shows that the power granted was to be exercised "for the security and safety of citizens and other persons from the running of trains through any city." The preamble to the ordinance discloses the same intent; that is, that an electric light at railroad crossings "is necessary for the security and safety of citizens and other persons from the running of trains through the city of Shelbyville." The purpose, then, is not ordinary street lighting, or even track lighting, but "security and safety * * * from the running of trains." It is clear also that, under the guise of protecting citizens from passing trains at public crossings, the city could not enter into a general system of street lighting at every point where a railroad track crosses a public street. This would be an unreasonable exercise of the power granted by the legislature.

We are of opinion that the intent of the act is not substantially different from that of those statutes which provide for other safeguards of various kinds at railroad crossings.

It was said by this court, in *Kistner, Exx., v. The City of Indianapolis*, 100 Ind. 210, that: "In the *forty-second* clause of section 3106, R. S. 1881 (3541, Burns' R. S. 1894), it is enacted that the common council of the city shall have power to 'provide, by ordinance, for security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same.' We think, therefore,

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that the power of the city of Indianapolis to have compelled the Union Railway Company to erect, maintain and use such proper and suitable safeguards, as seemed best to the city, at the place where the seven railroad tracks crossed Illinois street and its sidewalk, is clear and unquestionable." And the court accordingly held that at such a crossing the city had undoubted power, under the clause of the statute cited, to require the railroad company to erect safety gates. Under the same clause, also, a city may, by ordinance, require flagmen at crossings where trains pass or are liable to pass; and we have no question that under the same general grant of power, as well as under the statute before us, the city of Shelbyville might have required suitable lights to be placed by the railroad companies wherever, on account of the passing of trains over the crossings, the public safety should render it necessary. See also *Toledo, etc., R. W. Co. v. City of Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Hayes v. Michigan, etc., R. R. Co.* 111 U. S. 228.

The power granted by the statute in this case is general; the mode and manner of its exercise are not given in the act, but are left to the discretion of the city. We may, therefore, inquire whether there was a reasonable exercise of the power granted; or whether, in fact, power was given the city to do what it attempted. The act authorized the city to require railroad companies "to keep and maintain lights on all nights that the common council may direct, at the points where the railroad tracks cross a street in any city." The ordinance, assuming to proceed under this grant, provides that every railroad company shall maintain a light "wherever a track of such railroad company crosses a public street in said city." The lights are ordered at every crossing, whether the security and safety of citizens requires it or not, and

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wherever any track crosses, even a switch track which may not be used once a week, and never in the night. This of itself indicates that it was the lighting of the streets, and not the safety of crossings that was aimed at in the ordinance.

We have no doubt, as indeed counsel for appellee admit, that, under the police power, the legislature may authorize cities to require railroad companies to light their crossings throughout the corporate limits. That is a matter for the judgment of the legislature. In this case, however, the law-making power has not seen fit to extend such a grant to cities, but has sought simply to give authority to protect citizens from passing trains. It was the plain intent to say definitely that the power heretofore given under which cities might require gates and flagmen at dangerous crossings, would also authorize the requirement of lights for the same purpose.

The statutory grant of power as to the kind of light was also general, limiting the lights only to such as should be maintained by the city. Under the authority so given, the ordinance provided for electric lights, which provision, we think, was authorized, in as much as electric lights were maintained by the city; but it was also provided in the ordinance that the lights should be of the "arc pattern," thus confining the company to a particular kind of electric lighting, and possibly to particular lamps in use in the city. Doubtless, under the statute, the ordinance could have required the light to be of a power sufficient to light the crossing, not to exceed that in use in the city; but there could be no authority further to interfere with the company's freedom of contract in providing such electric lights as it might prefer. The purpose of the statute, the protection of travelers over the crossings

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from danger from running trains, must not be lost sight of.

It may also be questioned whether the ordinance is not objectionable from what it omits, no less than from what it expresses. It is not provided when the lamps shall be lighted, nor how long they shall continue to burn; only that the lighting "shall be on the same schedule plan adopted and used by said city;" and, in the penal clause, that a fine not exceeding \$10.00 shall be imposed for "each night" when there is a failure to provide the specified light. We think the time or times of lighting should have been fixed definitely in the ordinance. Nor do we think there is anything to the contrary in the case of *Cincinnati, etc., R. R. Co. v. Sullivan, Treas.*, 32 Ohio St. 152, to which we are referred. There, as the court expressly found, the ordinance strictly followed and in no way transcended the powers conferred by the statute.

"What the legislature distinctly says may be done," to repeat the words of Judge Dillon, "cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate upon a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power."

We think that in this case the common council exceeded the power conferred by the statute, in requiring that the electric lights should be of a particular pattern; and that there was also an unreasonable exercise of the power granted, in practically providing for street lighting instead of lights for crossings over which trains run, or are liable to run, at night, and also in not providing definitely for the times during which the lamps should be lit.

Boots v. Ristine.

The court, therefore, did not err in holding the ordinance invalid.

Judgment affirmed.

HACKNEY, J., took no part in this decision.

146	75
163	6

BOOTS v. RISTINE.

[No. 17,749. Filed May 26, 1896. Rehearing denied Oct. 18, 1896.]

APPEAL AND ERROR.—Assignment of Error.—A joint assignment of error based upon the action of the court in overruling a demurrer to two paragraphs of answer, is not available if either of the paragraphs of answer is good.

JUDICIAL SALES.—Payment of Purchase-money.—An execution creditor may make a valid purchase of property without paying the amount of the principal debt to the sheriff where in lieu thereof he receipts the sheriff for that amount, and where there is no question of his first right to the fund otherwise paid to the sheriff.

From the Montgomery Circuit Court. *Affirmed.*

F. M. Dice and Kennedy & Kennedy, for appellant.

Ristine & Ristine, for appellee.

HACKNEY, C. J.—The appellant sued the appellee to quiet the title to certain real estate, alleging the invalidity of a sheriff's sale under which the appellee claims through the purchase at said sale. The theory of the complaint is, that the property was bid in by the execution creditor at double the amount of his judgment, and that he paid no part of the bid, but gave the sheriff his receipt therefor.

The question assigned in this court as error arises upon the action of the circuit court "in overruling the appellant's demurrer to the second and third paragraphs of appellee's answer." As this assignment is joint, if either answer is good, there is no available error in the record. *Noe v. Roll*, 134 Ind. 115.

Boots v. Ristine.

The third paragraph of answer alleged the recovery, in 1875, of a judgment in favor of George Cook for \$630.30 and costs, against the appellant; that in March, 1885, execution issued upon said judgment; that the various steps, as to demand, notice and sale were taken and the return upon the execution is set out at full length in the answer. From the return it appears that said Cook was the purchaser for \$748.95, and that he paid the full amount thereof to the sheriff, who made distribution thereof and in part to said Cook upon said execution. It is further alleged that the purchaser obtained a sheriff's deed in May, 1886, when he took and held possession until December, 1890, at which time he sold and conveyed to the appellee, who had no notice of the fact that the purchase-money was not paid to the sheriff by Cook.

Appellant's learned counsel attack this answer as not alleging that Cook paid the purchase-money to the sheriff, but rather as disclosing, by way of the recital in the return, that, after paying costs, the sheriff paid back to Cook the balance. From this assumption, against the plain language of the return as pleaded, counsel argue that no money was paid by Cook beyond the amount of the costs, and they insist upon the rule, as laid down in *Liggett v. Firestone*, 96 Ind. 260, that a sheriff's sale must be for cash, at the time paid, or it is void.

Passing the question as to the right of the appellant to deny the sheriff's return, *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574, it has been long settled that the execution creditor may make a valid purchase without paying the amount of the principal debt to the sheriff where, in lieu thereof, he receipts to the sheriff for that amount and where there is no question of his first right to the fund otherwise paid to the sheriff. *Burton v. Ferguson*, 69 Ind. 486; *Robert-*

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son v. Van Cleave, 129 Ind. 217, 15 L. R. A. 68; Clossen v. Whitney, 39 Minn. 50, 38 N. W. 759.

We conclude, therefore, that the answer is not subject to the objection made against it.

The judgment of the circuit court is affirmed.

SMITH v. MCCLAIN ET AL.

[No. 17,297. Filed October 14, 1896.]

146	77
149	207
150	370
152	144

QUIT-CLAIM DEED.—*Bona Fide Purchaser.*—*Statutes Construed.*—Under sections 3343–3348 Burns' R. S. 1894, the grantee in a quit-claim deed may become a *bona fide* purchaser the same as under any other form of conveyance. p. 83.

146	77
153	336
146	77
155	145
155	146

SAME.—*To Childless Second Wife by Husband's Children.*—Where a husband dies intestate leaving two children and a childless second wife as his heirs at law, and the two children by quit-claim convey "all the right, title and interest" which they have as such heirs in a certain tract of land to the childless second wife, such conveyance vests in her a fee-simple title to the undivided two-thirds interest of the children. p. 83.

DEED.—*Evidence.*—By the execution of a deed the preliminary contract is executed, and any inconsistencies between its terms and those of the deed are to be explained and settled by the deed alone. p. 87.

SAME.—*Declaration of Party in Possession of Real Estate.*—*Evidence.*—The declarations of a party in possession of real estate, showing the character of his possession and the title by which he held are competent as evidence against those claiming under him, except such evidence cannot be given to sustain or destroy the record title. p. 87.

EVIDENCE.—*Consideration.*—Parol evidence as to the true consideration of a deed is not competent to defeat the operation of the deed as a valid and effective grant. p. 87.

STATUTES.—*Construction of Deeds.*—*Descent.*—If the Act of March 11, 1889 (Acts 1889, p. 430, section 1; Burns' R. S. 1894, 2644) is unconstitutional because it attempts to amend a statute already repealed, that fact does not invalidate the remaining sections, 2645–2647, Burns' R. S. 1894, since they are so complete in themselves as to stand alone, and the subject of the same is suffi-

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ciently expressed in the title to comply with the requirements of the constitution. *p. 89.*

SAME.—Construction Of.—Subject-matter of Act.—The requirement of the Constitution, Article 4, section 19, that “every act shall embrace but one subject and matters properly connected therewith,” is not violated by Act, March 11, 1889 (Acts 1889, p. 430). *p. 89.*

SAME.—Construction Of.—Descent.—Deed.—Conveyance by Heirs to Childless Second Wife.—Estoppel.—Under Act March 11, 1889 (Acts of 1889, p. 430, sections 2 and 3; Burns’ R. S. 1894, 2645, 2646) where, during the life of the childless second or subsequent wife of an intestate, his children convey in fee lands affected by her life-estate, and receive full payment therefor, they are estopped from claiming any title thereto; and under said sections, it was competent to prove whether there was any contract for the conveyance of the “fee” of the one-third part of the real estate which the widow inherited, and the consideration to be paid therefor, and whether full payment had been made. *p. 89.*

From the Marion Circuit Court. *Reversed.*

Miller, Winter & Elam, for appellant.

Denny & Taylor, for appellees.

MONKS, C. J.—Appellees brought this action to quiet their title to and recover possession of certain real estate, described in the complaint. Appellant filed an answer and also a cross-complaint to quiet his title to the same real estate. Appellees filed an answer to said cross-complaint and reply to appellant’s answer.

The cause was tried by the court and a finding made in favor of appellees, and over a motion for a new trial judgment was rendered against appellant. The causes specified for a new trial were:

First. Errors of law occurring at the trial in admitting certain evidence over appellant’s objection.

Second. That the finding of the court was not sustained by sufficient evidence.

Third. That the finding of the court was contrary to law.

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Fourth. Error in assessing the amount of the recovery, the same being too large.

The action of the court in overruling the motion for a new trial is assigned as error.

It appears from the evidence that the real estate in controversy, a house and lot in the town of Zionsville, worth about \$1,000.00, was owned in fee-simple at the time of his death, in April, 1884, by one Jonas Case, and was his family residence. He owned at the same time 120 acres of farming land in Marion county, Indiana, worth about \$7,000.00, and some business property in the town of Zionsville. His heirs at law were his widow, Margaret E. Case, a second wife without children, and the appellees, Frances A. McClain and one William H. Case, children by a former wife. William H. Case died in December, 1891, leaving the appellees, Aletta M., Neldo O., and Flossie A. Case, his only children and heirs at law. The widow, Margaret E. Case, died in January, 1892. After the death of Jonas A. Case, she married Ithamar Whicker, who survived her, and with one Mary Stultz, her mother, constituted her sole heirs at law. After the death of Jonas Case, on the 19th day of September, 1884, his children, William H. Case and his wife and Frances A. McClain and her husband, executed a quit-claim deed to the widow, Margaret E. Case, for the house and lot in Zionsville. The deed recites a consideration of \$1,000.00, and immediately following the description of the property contained a further recital in the following language: "The grantors herein, William H. Case and Frances A. McClain, being the sole and only heirs of Jonas Case, except the grantee, who is the widow of said Case and without children, and this conveyance being made in settlement and adjustment of their interests in real estate herein described and certain lands in Marion county, Indiana,

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described in deed of even date herewith by grantee herein and Frances A. McClain and her husband to William H. Case.”

At the same time Margaret E. Case and Frances A. McClain and her husband executed a quit-claim deed to William H. Case for “all their right, title and interest” in the 120 acres of farming land in Marion county, Indiana. This deed recites a consideration of \$1,000.00, and following the description contains a further recital as follows: “which the said Margaret E. Case, as widow without children, and Frances A. McClain, as daughter, have derived as heirs of Jonas Case, said Frances A. McClain and the grantee herein, being the only children and heirs of Jonas A. Case.”

In consideration of the conveyance to William H. Case by Margaret E. Case and Frances A. McClain and husband of “all their right, title and interest” in said 120 acres of real estate, he paid his sister, Mrs. McClain, \$3,500.00, and he and said Frances A. McClain promised to pay Margaret E. Case \$1,000.00, and executed the quit-claim deed to her for the real estate in controversy.

The first deed was properly recorded shortly after its execution in Boone county, Indiana, and the second deed in Marion county, Indiana. No disposition was made of the business property in Zionsville, of which Case died seized. It continued to be held by his widow and children as tenants in common until the death of the widow. After the execution of the deeds of September 19, 1884, Margaret E. Case remained in exclusive possession of the house and lot in Zionsville until her death, after which her second husband, Ithamar Whicker, and mother, Mary Stultz, claimed that it had descended to them as her heirs at law. On the 25th of March, 1892, Mrs. Stultz, by quit-claim deed conveyed her interest to Mr. Whicker, and on the 21st

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of April, 1892, he conveyed the entire property by quit-claim deed to the appellant, who took and retained possession until the time of the commencement of this suit.

The court permitted the witness, Sarah S. Case, to testify as to the purpose of making such deed, and as to statements made by Margaret E. Case before and at the time of its execution, to show that it was made for the purpose of effecting a partition and without any intention of increasing the title of Margaret E. Case. For the same purpose, the deed executed at the same time by Margaret E. Case and Frances A. McClain to William H. Case for the farming land in Marion county was admitted in evidence, and Mrs. Klingenschmidt was also permitted to testify as to certain statements made to her subsequently by Margaret E. Case, which it was claimed tended to show that she understood at her death the property in controversy would go to the appellees. All this evidence was objected to by the appellant, and its admission properly excepted to.

The theory upon which appellees base their right to recover is that the interest of Margaret E. Case in the real estate of Jonas Case, deceased, at her death descended to the appellees, the children and grandchildren of Jonas Case, as her forced heirs, and that the deed which was executed to her on the 19th day of September, 1884, by the children of Jonas Case was made only for the purpose of effecting a partition between her and the children of Jonas Case of the house and lot in Zionsville, in controversy in this action, and the 120 acres of farming land in Marion county, and that her title to the property in controversy was not increased by such deed, but that at her death it descended to the appellee as her forced heirs, precisely as if such deed had not been made.

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The theory of the appellant was: First, that the legal effect of the deed of September 19, 1884, executed by Frances A. McClain and William H. Case to Margaret E. Case, was to make the latter the absolute owner in fee-simple of two-thirds part in value of the real estate in controversy, leaving only one-third part, which had descended to her from Jonas Case, subject to descend at her death to the children and grandchildren of Jonas Case as her forced heirs, and that such legal effect could not be impaired or changed by parol evidence; that the deed was made for the purpose of effecting a partition only, or of statements or declarations of the parties thereto as to the title that was intended to be conveyed thereby; second, that by force of the second section of the statute of March 11, 1889 (Acts 1889, p. 430); Elliott's Supplement, sections 423-26; Burns' R. S. 1894, sections 2644-47), the deed to Margaret E. Case of September 19, 1884, had the effect, upon the death of Margaret E. Case, to estop the appellees from asserting that they took, as her forced heirs, the one-third interest in the property in controversy, which descended to her as the widow of Jonas Case; third, that the evidence as to the deed of September 19, 1884, having been made for the purpose only of effecting a partition, did not establish such fact.

After the death of Jonas Case, in 1884, intestate, one-third part in value of the real estate of which he died seized descended in fee-simple absolutely to each of the children of his first wife, Frances A. McClain and William H. Case. Section 2622, Burns' R. S. 1894. The remaining one-third descended in fee-simple to his widow, Margaret E. Case, but under a disability personal to herself to make any conveyance of such interest as would prevent the descent at her death to the

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children of her husband by his first wife. Sections 2483-2487, R. S. 1881; *Haskett v. Maxey*, 134 Ind. 182.

On the 19th day of September, when the deed to the property in question from Frances A. McClain and William H. Case was executed, they had full power to convey their absolute title in fee-simple to two-thirds in value of said real estate to any person who was not under disability to receive such conveyance. The widow, Margaret E. Case, was under no disability to take by deed title in fee-simple to such two-thirds interest.

The statute provides that a quit-claim deed, unless limited to a less interest shall pass the entire estate of the grantor as effectually as a deed of bargain and sale. Sections 3343, 3347, 3348, Burns' R. S. 1894 (2924, 2928, 2929, R. S. 1881); *Rowe v. Beckett*, 30 Ind. 154; *Davidson v. Coon*, 125 Ind. 497, 502, 9 L. R. A. 584.

The ordinary effect of such a deed is to convey all the existing interest of the grantor in the land described, and to that extent is as operative as any deed can be. *Hastings v. Brooker*, 98 Ind. 158, and cases cited.

There is nothing in the deed to the widow to indicate that it was not the intention of the grantors that it should have its full legal effect and vest in her an absolute title in fee-simple to the undivided two-thirds of the real estate described, which the grantors then owned in fee-simple.

It follows that the deed to the widow, Margaret E. Case, conveyed to her the undivided two-thirds of the real estate in controversy, unless there was something which changed or controlled the ordinary legal effect of such a deed.

Appellees urge that as appellant acquired title to the real estate in controversy by quit-claim deed that he cannot be, for that reason, a purchaser in good

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faith, and is not entitled to any consideration as such. A quit-claim deed conveys all the title a grantor has, and is as effectual to transfer title to land as a deed of bargain and sale. Sections 3343, 3347, 3348 (2924, 2928, 2929), *supra*; *Davidson v. Coon, supra*; *Hastings v. Brooker, supra*.

While there is some conflict in the authorities upon this question, we think the correct doctrine under the recording acts is that, one may become a *bona fide* purchaser under a quit-claim deed, the same as under any other form of conveyance. *Hastings v. Brooker, supra*; *Dow v. Whitney*, 147 Mass. 1, 16 N. E. 722; *Chapman v. Sims*, 53 Miss. 154; *Willingham v. Hardin*, 75 Mo. 429; *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Graff v. Middleton*, 43 Cal. 341; *Frey v. Clifford*, 44 Cal. 335; *Hamilton v. Doolittle*, 37 Ill. 473; *Brown v. Banner, etc., Co.*, 97 Ill. 214, 37 Am. Rep. 105; *McConnel v. Reed*, 5 Ill. 117, 38 Am. Dec. 124; 2 Jones' Law of Real Prop. in Conv., sections 1394, 1395, 1396, and cases cited in notes.

Appellees insist "that where voluntary partition is made by quit-claim deed executed by the tenants in common, that such deeds do not convey title, but they simply have the effect to sever the unity of possession, and do not vest in either of the co-tenants any new or additional title; that after the execution of such deeds each has precisely the same title he had before, except that he holds his share of the whole in severalty instead of in common. *Bumgardner v. Edwards, Tr.*, 85 Ind. 117; *Taylor v. Birmingham*, 29 Pa. St. 306; *Dawson v. Lawrence*, 13 Ohio 543, 42 Am. Dec. 210; *Stehman v. Huber*, 21 Pa. St. 260." See, also, *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57;

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Chace v. Gregg 88 Tex. 552, 32 S. W. 520; *Davis v. Agnew*, 67 Tex. 206, 2 S. W. 43.

That under this doctrine they had the right to give parol evidence to prove that the two deeds executed September 19, 1884, were partition deeds, and that the statements of Margaret E. Case, testified to by Mrs. Sarah S. Case and Mrs. Klingenschmidt, tended to prove that fact, and that the court did not err therefore in admitting their testimony.

Appellant contends that what was said in *Bumgardner v. Edwards, Tr.*, *supra*, cited by appellee "as to mutual deeds for the purpose of perfecting partition, not conveying title, was *obiter dictum*," and that this court, in *Davidson v. Coon*, *supra*, declared the contrary doctrine. That the other cases cited by appellees are not applicable here for the reason that the deeds in those cases either recited that they were partition deeds or parol partition had been made, and each co-tenant had taken possession of his own part, and the same was vested in him in severalty, before the deeds were executed, so that when they were executed the grantors had no interest in the real estate described therein which they could convey to the grantee, he being already the owner thereof in severalty.

As we view the facts of this case, it is not necessary to determine, and we do not determine, whether or not mutual deeds of partition, containing no statement or recital that they are such, convey title or merely sever possession.

The deed for the Marion county land conveyed to William H. Case "all the right, title and interest which the grantors, Margaret E. Case, as widow without children, and Frances A. McClain, as daughter, have derived as heirs of Jonas Case." This conveyance did not merely operate to set off to the grantee

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to hold in severalty what he had before its execution held in common in both tracts. It vested in him the absolute title in the 120 acres of Marion county land so far as the grantors had the power to convey the same, leaving no interest whatever in them. After said deed was executed he held the undivided one-third of said Marion county land as heir of Jonas Case, and the other two-thirds by virtue of said deed. It was not a partition deed, and was not claimed to be such.

Margaret E. Case received for her interest in said Marion county land the quit-cláim deed of William H. Case and wife and Frances E. McClain and husband for the real estate in controversy and \$1,000.00 in money. It is recited in this deed that it was made "in settlement and adjustment of their interests in the real estate herein described and certain lands in Marion county, described in a deed of even date herewith." Construing these two deeds together there is nothing to show that they were executed for the purpose of effecting a partition.

Considering that William H. Case, Frances A. McClain and Margaret E. Case owned the real estate described in the deeds as tenants in common, and that the deeds were executed at the same time containing the recitals set forth, and that Margaret E. Case was to receive \$1,000.00 and Frances A. McClain \$3,500.00, these facts do not show that the deeds were mutual deeds of partition. After these deeds were executed, William H. Case owned property valued by the parties at \$4,500.00, more than the interest he owned before, and Mrs. McClain had parted with real estate valued at \$3,500.00, and Mrs. Margaret E. Case owned real estate valued at \$1,000.00 less than her interest before the deeds were made. It was not a mere partition of real estate, but a transaction to which the rules of evi-

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dence with reference to ordinary contracts in the purchase and sale of real estate apply.

It is the general rule that when two parties have entered into a written contract all previous negotiations and propositions in relation to such contract are merged in the final agreement, and in the absence of fraud or mistake cannot be given in evidence to vary or modify such written agreement. *Bever v. Bever*, 144 Ind. 157; *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Sage v. Jones, Admr.*, 47 Ind. 122; *Ice v. Ball*, 102 Ind. 42, 46; *Reynolds v. Louisville, etc., R. W. Co.*, 143 Ind. 579, pp. 614–616, and cases cited; *Coy v. Stucker*, 31 Ind. 161; *Hostetter v. Auman*, 119 Ind. 7; *Oiler v. Gard*, 23 Ind. 212.

It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its terms and those in the deed are to be explained and settled by the deed alone. *Phillbrook v. Emswiler*, 92 Ind. 590, and cases cited; *Cole v. Gray*, 139 Ind. 396, and authorities cited on pages 407, 408.

In *Cole v. Gray*, *supra*, this court said: "In 2 Devlin on Deeds, section 837, it is said: 'the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions.' And the same author, in section 840, says: 'The intent, when clearly expressed, cannot be altered by evidence of extraneous circumstances.' "

It is insisted by appellee that it is always competent to prove by parol the true consideration of a deed, and that it is impossible to give effect to this doctrine without permitting proof of the agreement as to consideration which preceded the execution of the deed.

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That, under this rule, the evidence of Mrs. Case as to the statements and agreements of the parties at the execution of the deeds, was competent. This is a correct statement of the rule as declared in this State, except that such evidence is not competent to defeat the operation of a deed as a valid and effective grant. *Levering v. Shockey*, 100 Ind. 558, and cases on pp. 560, 561. A deed absolute on its face, however, may be shown by parol evidence to have been executed only as a mortgage. *Hanlon v. Doherty*, 109 Ind. 37; *Ashton v. Shepherd*, 120 Ind. 69; *Bever v. Bever, supra*, and cases cited.

It is also insisted by the appellees that the declarations of a party in possession of real estate, showing the character of his possession and the title by which he held are competent as evidence against those claiming under him, and that, therefore, the court did not err in permitting Mrs. Klingenschmidt to testify to the declarations made by Margaret E. Case when she was in possession of the real estate in controversy. This rule is correctly stated, except such declarations cannot be given in evidence to sustain or destroy the record title. *Steeple v. Downing*, 60 Ind. 478, and authorities cited on p. 503; *Gibney v. Marchay*, 34 N. Y. 301; *Jackson v. Miller*, 6 Cowen, 751; *Jackson v. McVey*, 15 Johns. 234.

Appellant next insists that by force of section 2 of the act of March 11, 1889, Acts 1889, *supra*, section 2645, *supra*, the deed to Margaret E. Case of September 19, 1884, had the effect to estop appellees from asserting that they took as her forced heirs the one-third interest in the property in controversy, which she inherited as the widow of Jonas Case. Appellees contend that section 1 of said act is unconstitutional because it attempted to amend section 2 of the act of March 4, 1853 (Acts 1853, p. 55), which was repealed

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by the act of March 9, 1867 (Acts 1867, p. 204), and that an act amending a repealed act is void. *Boring, Aud., v. State*, 141 Ind. 640, and cases cited. Appellees further contend that the entire act is unconstitutional because it is in contravention of section 19, Art. 4, of the constitution, which is as follows: "Every act shall embrace but one subject and matters properly connected therewith." We do not think the act contravenes the provision of the constitution quoted, as it embraces but one subject and matters properly connected therewith.

If, however, the first section attempts to amend a statute which had no existence, it is unconstitutional for that reason, and it and so much of the title as relates thereto are to be disregarded, and the only inquiry is whether the other parts are so complete in themselves as to stand alone, and whether there is remaining in the title of the act sufficient description of the subject to which they relate. *City of Indianapolis v. Bieler*, 138 Ind. 30, and authorities cited on p. 38; *Penniman's Case*, 103 U. S. 714; *Presser v. State of Illinois*, 116 U. S. 252.

It is apparent that if all that is contained in the first section of the act and all the title of the act which is the subject of the first section were eliminated, the remaining sections 2, 3 and 4 would be a complete statute, and the subject of the same would be sufficiently expressed in the title to comply with the requirements of the constitution.

Under sections 2 and 3 of said act, being sections 2645, 2646, Burns' R. S. 1894, if William H. Case and Frances A. McClain executed their deed for the purpose of conveying to Margaret E. Case the fee-simple of the undivided one-third which she inherited from her husband, Jonas Case, and they have received full payment therefor, then appellees can claim no title to

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said one-third. Under these sections it was competent to prove whether there was any contract for the conveyance of the "fee" of said one-third part of the real estate affected by the widow's, and the consideration to be paid therefor, and whether full payment had been made. Appellant's title to said one-third depends upon the conditions prescribed in said sections. If all the requirements of either section 2 or 3 of said act have not been complied with he has no title to said one-third.

There was no conflict in the evidence, and the finding should have been that appellant was the owner in fee-simple of the undivided two-thirds of said real estate, and that appellees were the owners in fee-simple of the undivided one-third thereof. The finding was, therefore, contrary to law.

It follows that the court erred in overruling the motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial and for further proceedings not in conflict with this opinion.

PYLE v. PEYTON.

[No. 17,871. Filed October 14, 1896.]

PLEADING.—Assault and Battery.—Answer in Justification of Assault.—An answer to a complaint for an assault and battery in justification thereof which does not allege any fact necessarily implying that the occurrence alleged in the complaint, and that set up and justified in the answer, were one and the same, is bad.

SAME.—Practice.—Facts alleged in one paragraph of a pleading can not be called to the support of another paragraph.

PRACTICE.—Harmless Error.—Overruling a demurrer to a bad answer will not be presumed harmless unless the evidence as set out in the record shows that the cause was properly tried and determined upon its merits.

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From the Howard Circuit Court. *Reversed.*

Moon & Wolf, for appellant.

J. C. Herron and Blacklidge & Shirley, for appellee.

HACKNEY, J.—The appellant sued the appellee for damages alleged to have been sustained from an assault and battery committed by the appellee upon him “on December 22, 1894.” The appellee answered in six paragraphs, the fifth of which was as follows:

“For a fifth paragraph of answer this defendant alleges that on the 23d day of December, 1894, this plaintiff entered the business room of this defendant in a drunken and maudlin condition, and without invitation from the defendant; that immediately after entering said place of business this plaintiff unlawfully commenced breaking and damaging this defendant’s property, to-wit: glassware, by breaking said glassware; that said plaintiff further provoked this defendant by his unlawful conduct and threatening gestures and menacing attitude toward this defendant; that this defendant, believing that he would receive great bodily harm at the hands of this plaintiff because of the plaintiff’s threatening attitude and the plaintiff’s reputation for immorality and viciousness, and being in imminent danger of great bodily harm, immediately struck this plaintiff with a beer glass, but used no more force than was necessary to protect his person from said plaintiff. Defendant says plaintiff ought not to recover because said assault and battery was committed in defense of his person.”

To this answer, and others, a demurrer was overruled, and upon a reply in denial there was a trial, verdict and judgment for the appellee.

The only assignment of error is upon the action of the lower court in overruling said demurrer to said fifth paragraph of answer.

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One objection urged against this answer is that it does not justify the particular act complained of, and this objection, in our opinion, is fatal. The code, Burns' R. S. 1894, section 350, requires that such pleading shall "clearly refer to the cause of action intended to be answered." The answer in question does not allege any fact necessarily implying that the occurrence, the gist of the complaint, and that set up and justified in the answer were one and the same. The date of the occurrence alleged in the complaint and that alleged in the answer differ and, while the facts alleged in the pleadings respectively might suggest the inference that they were the same, the difference in the dates cannot be disregarded by the court. Nor can it be said that they do not present two distinct occurrences. If there was any connection between the two occurrences the answer should have disclosed it. If they were distinct occurrences there could be no question that the answer was bad, since the conduct of the appellant on the 22d could furnish no legal justification for an assault and battery on the 23d day of December. In pleading justification it should appear by direct averment or by necessary implication from the facts alleged that the acts justified are those complained of. *Gallimore v. Ammerman*, 39 Ind. 323; *Young v. Warder*, 94 Ind. 357; *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402.

A fact not necessarily implied, although inferable, is not sufficiently alleged by alleging the fact which suggests it. *Brown v. Brown*, 133 Ind. 476.

This objection to the pleading the appellee attempts to answer by referring to the allegation of another paragraph that the occurrence was "on or about the 23d of December." We need hardly remind counsel that the facts alleged in one paragraph of a pleading cannot be called to the support of another paragraph.

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If this were not so the doubtful allegations of one paragraph might be permitted to control the certain allegations of another.

It is said, also, that the ruling on demurrer was harmless since the cause was properly tried and determined upon its merits, as would appear from the evidence, if the appellant had brought the evidence into the record. Overruling a demurrer to a bad answer is not presumed harmless. *Sims v. City of Frankfort*, 79 Ind. 446; *Thompson v. Lowe*, 111 Ind. 272; *Scott v. Stetler*, 128 Ind. 385; *Over v. Shannon*, 75 Ind. 352; *Epperson v. Hostetter, Admr.*, 95 Ind. 583.

In Elliott's App. Proced., section 637, it is said, "So, where the record affirmatively shows that no harm resulted from overruling a demurrer to one of several paragraphs of an answer the error will not be deemed prejudicial. But it is to be observed of cases of the class last referred to that the record proper must show that the ruling was harmless, for the court will not search through the evidence for the purpose of ascertaining whether harm did or did not result."

For the error mentioned the judgment of the circuit court is reversed, with instructions to sustain the appellant's demurrer to the appellee's fifth paragraph of answer.

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[No. 17,550. Filed April 16, 1896. Rehearing denied Oct. 14, 1896.]

QUIETING TITLE.—*Sufficiency of Complaint*.—In an action to quiet title to certain land consisting of several parcels, the allegation in the complaint, "That the defendant claims some interest therein adverse to the plaintiff's, which claim is without right and unfounded, and a cloud upon plaintiff's title," sufficiently charges adverse and unfounded claim by defendant.

PUBLIC LANDS.—*Description Of*.—The boundaries of lots patented by

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the United States as numbered lots of their respective sections, cannot extend beyond the boundaries of the sections themselves.

REAL ESTATE.—Description in Deed of Conveyance.—In a description of real estate as "The S. half (or lots 1, 2, 3 and 4), Sec. 20," the particular reference to lots control the general description.

COUNTY SURVEYOR.—Location of Meander Line.—Boundary.—The location of a meander line by a county surveyor cannot establish that meander as a boundary unless the notice and other proceedings show that such was the purpose of the survey.

From the Lake Circuit Court. *Affirmed in part, and reversed in part.*

J. W. Youche and E. D. Crumpacker, for appellant.

Flower, Smith & Musgrave, and *P. Crumpacker*, for appellee.

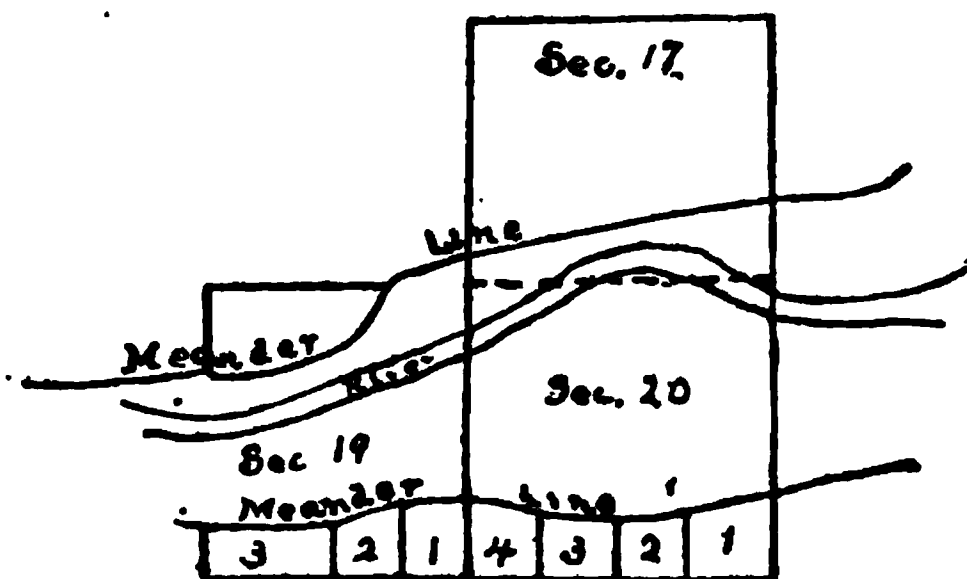
HOWARD, J.—This action was commenced by the appellee, in the circuit court of Lake county, against the appellant, to quiet his title to certain real estate in said county. In his complaint appellee alleges that he is the owner in fee-simple of all that part of sections 17, 19 and 20, in township 36, range 8, situated south of the thread of the Little Calumet river, and asks to have his title thereto quieted.

A demurrer having been overruled to the complaint, the appellant filed an answer disclaiming all interest in the lands described in the complaint, except in that part of said lands included between the meander line and the thread of the river, and denying the allegations of the complaint as to the lands so excepted.

There was a finding and decree quieting appellee's title to all the lands claimed by him. The appellant filed its motions to modify the findings and also the judgment, so as to exclude from the lands to be quieted in appellee all lands between the meander and the thread of the stream, and also that part of section 17 lying south of the river.

The subjoined is a plat of sections in which land in controversy is situated.

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Appellant's objection to the sufficiency of the complaint, is that there is in it "no allegation that the claim is adverse to the plaintiff, nor that the defendant's claim is unfounded."

The allegation made in the complaint in regard to appellant's claim to the land is: "That the defendant claims some interest therein, adverse to the plaintiff's, which claim is without right and unfounded, and a cloud upon plaintiff's title." This we think sufficient. The fact that the land whose title is sought to be quieted consists of several parcels is immaterial. Appellee claims to be the owner of it all, and alleges an adverse and unfounded claim by appellant. The allegations as to appellant's claim reach to the whole claim made by appellee.

• Many of the questions discussed by counsel under the remaining assignments of error have already been considered by this court in the case of the *Tolleston Club v. The State*, 141 Ind. 197. The fact that questions decided in that case should be discussed anew in this, may, perhaps, be accounted for by the circumstance that although the case against the State was begun over three years later than the case at bar, yet that case was appealed to this court and decided before the appeal in the case at bar was taken.

The appellee, as shown by the evidence, derives title by patent from the United States, under the swamp

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land act of 1850, based upon the plat of the original United States survey of 1834, through mesne conveyances to Ira O. Dibble, and by a deed to himself from the executors of Ira O. Dibble.

The appellant claims under an act of Congress of 1870 for the survey and sale of lands included between the meander lines of the Little Calumet river, contending that the lands between said meanders had not been included in the survey of 1834.

The lands here in dispute are a part of the lands in controversy in the case of the *Tolleston Club v. The State, supra*. There it was held that the lands between the meanders of the Calumet river, including the bed of the river, were fully surveyed in 1834, and the lands so surveyed all conveyed by patent to the State before 1870; and therefore that the government, not having any such lands unsold or unsurveyed in 1870, the act of Congress for that year and all proceedings thereunder were wholly void. It follows that the appellant in the case at bar, as also in the case against the State, could have no title under the act of 1870, and the survey thereunder, as here claimed.

The lands conveyed to appellee by the executors of Ira O. Dibble, as described in the inventory appraisement, executors' deed and other papers and proceedings in the court having charge of the settlement of the estate of said decedent, omitting the acreage in each description, are as follows:

"Lot one, Sec. 19, T. 36, R. 8. Part lots two and three, commencing 50 rods north of the S. E. cor. of said lot two, thence W. 160 rods, thence N. to N. line of said lot three, thence easterly along the N. line of said lots to the N. E. cor. of said lot two, thence S. to the place of beginning, being a part of Sec. 19, T. 36, R. 8. The S. half (or lots 1, 2, 3 and 4), Sec. 20, T. 36, R. 8."

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In the executors' report of sale, the last description is written: "The S. half of lots 1, 2, 3 and 4, Sec. 20, T. 36, R. 8." But counsel for appellant concedes that here also "probably this word 'of' is a mistake of the scrivener and should read 'or.' "

An examination of all the proceedings of the court in relation to the executors' sale of the land in question makes it evident that the intention was to sell to appellee all the land held by the decedent by virtue of the original patents from the United States and from the State for the same fractional lots. Whatever land, under these descriptions, the decedent, Ira O. Dibble, might claim through his patents, that the appellee may claim by reason of his purchase from the executors of said decedent. All was sold through the court proceedings that could be sold, that is, all that had been owned by Ira O. Dibble.

Under the holding in the case of the *Tolleston Club v. The State, supra*, it is plain that the lots described, being lot one and parts of lots two and three, in section 19, and lots one, two, three and four, in section 20, all extend north to the north section lines of their respective sections. But as the appellee, in this action, claimed only to the thread of the Little Calumet river, it is of course apparent that his title will be carried only to the thread of the stream so claimed by him as his northern boundary. It is clear, also, that where, in any case, the north section line is south of the river, in such case the north boundary will be limited to the north line of the section. The territory having been surveyed into full and uniform sections, and the lots patented as numbered lots of their respective sections, the boundaries of the lots cannot extend beyond the boundaries of the sections themselves.

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It follows, that all land claimed by appellee in sections 19 and 20 was properly decreed to him by the court. The claim made by appellee, however, to a part of section 17 was incorrectly allowed. The motion to modify the judgment in this particular should therefore have been sustained.

Counsel for appellant argue that the description of the lots in section 20 as, "The S. half (or lots 1, 2, 3 and 4), Sec. 20," shows that not more, at most, than the south half of section 20 should be decreed to appellee. We think the particular reference to lots in this description must control the general description which precedes. Besides, as already shown, it is evident from all the court proceedings that it was the intention in the executors' sale to convey to appellee the whole interest of the estate of Ira O. Dibble.

Counsel also contend that the record of a survey made by the county surveyor in 1883 discloses the fact that the meander line was then established as the boundary between the lands of appellant and appellee. A reference to that record, however, makes it evident that the survey in that case, as stated in the notice of the survey, was not to establish any boundary, but only "to locate, mark, establish and perpetuate: The following corners and meander lines established by the government surveys made in June, 1835," etc. The location of a meander line by a county surveyor cannot establish that meander as a boundary, unless the notice and other proceedings show that such was the purpose of the survey.

The judgment is affirmed as to all the land in sections nineteen and twenty lying south of the thread of the Little Calumet river, in township 36 north, range 8 west, decreed to be owned in fee-simple by appellee; and reversed as to all the land in section seventeen, said township and range, decreed to be

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owned by appellee, with instructions to the court to sustain the motion to modify said judgment and decree as to the lands in said section seventeen; and when so modified said judgment is affirmed at the costs of appellant.

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[No. 17,725. Filed October 15, 1896,]

STATUTES.—*Construction of in Contested Election Cases.*—Statutes providing for contesting elections should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. *p. 103.*

NOTICE.—*Special Session of Commissioners' Court.*—*Commencement of Term of New Member of Board After Notice.*—The board of county commissioners is not dissolved by one member going out and another coming in, and if the existing members of the board have proper notice of a meeting of the board to hear and determine contested election cases, called by the auditor as provided by statute, no further notice is required to be served on new members who become such before the meeting. *p. 104.*

SAME.—*Commissioners' Court.*—*Special Session.*—*Contested Election.*—Where the notice to the board of county commissioners to meet in special session to try a contested election case was not served, but the members appear at the time and place fixed to try the same, thus waiving service of notice, neither the contestor nor contestee can object to such want of service. *p. 104.*

SAME.—*Commissioners' Court.*—*Special Session.*—Where a notice to the members of the board of commissioners to meet in special session states their names incorrectly or names the wrong persons, and the legal members thereof attend, the special session will be lawful. *p. 104.*

SAME.—*Commissioners' Court.*—*Special Session.*—*Contested Elections.*—*Statute Construed.*—When notice has been issued to the board of commissioners, and the contestee, as required by section 4760, R. S. 1881 (6316, Burns' R. S. 1894), and the board of commissioners fail to meet in such special session, and no other special session is called before the next regular session of the board, such contested election case, as provided in said notice for a special session, may be tried at the regular session of such board. *p. 105.*

146	99
155	40

146	99
165	491

146	99
170	426

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COMMISSIONERS' COURT.—*Extension of Trial Beyond Regular Term.*
—*Statute Construed.*—Section 1379, R. S. 1881 (1442, Burns' R. S. 1894) which provides that, if at the expiration of any term of court the trial shall be progressing, the court may continue its sitting beyond such time, is applicable to the board of commissioners when sitting as a court in the trial of a cause.

SAME.—*Rules Governing.*—A board of county commissioners sitting as a court for the trial of a contested election case has the same power to make and correct its entries to conform to the facts, and is governed by the same rules in the exercise of such power as the circuit court, and the presumption will be indulged in favor of a *nunc pro tunc* entry by it, that it was made upon proper evidence, and that it states the facts as they occurred in the cause.

From the Miami Circuit Court. *Reversed.*

Loveland & Loveland and *N. N. Antrim*, for appellant.

F. D. Butler and *C. A. Cole*, for appellee.

MONKS, C. J.—Appellant and appellee were opposing candidates for the office of township trustee at the November election, 1894, and appellee was declared elected to said office. At the proper time appellant filed a statement of the grounds of contest with the county auditor, as required by section 6314, Burns' R. S. 1894 (4758, R. S. 1881). And on November 20 the auditor issued a notice to the board of commissioners, naming Samuel King, Ezekial V. Robbins, and James W. Knox, as the members thereof to meet on November 30, at the courthouse, to hear and determine the case of the appellant v. this appellee, as well as four other contested election cases. This notice was served by the sheriff on the persons named therein on said day. The auditor also issued the proper notice to appellee, which was served on him. The board of commissioners did not meet on the 30th of November, the date fixed by the auditor.

On December 3, 1894, the board of commissioners,

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Lewis Bond, Daniel King and David Stitt, met in regular session, and on December 6, the fourth day of said regular term, by order of the board, a *nunc pro tunc* entry was made, setting forth the foregoing facts and also other matters, showing why said board did not meet on November 30 to try said election contests. From this entry it appears that Jesse W. Knox was not a member of the board of commissioners when said notice was issued, nor when the same was served on him, but David Stitt was, from and after November 16, 1894, the commissioner from the first district, having succeeded said Knox on said day, as was adjudged by the Miami Circuit Court. That on November 26, 1894, a writ of mandate and prohibition was, by order of the Miami Circuit Court, duly issued, commanding said Robbins not to act with said Knox or recognize him as a member of the board of commissioners, and that he only act in conjunction with said King and one Stitt, and that said Knox be prohibited from acting as a member of said board or interfering then with the business thereof, until the further order of the court, which order and writ were made perpetual on December 3, 1894. That Daniel King, one of the commissioners named in said notice, was sick when the same was served on him, and was unable to attend the meeting of the board on November 30, 1894, and said David Stitt had not been notified of said meeting and was not then present to participate in the proceedings of said board, and there was no meeting on said day as no quorum was then present; that on said 30th day of November, at the time set for the hearing of said contest, appellee and his attorney acknowledged service of said notice of contest and entered his appearance thereto. At the time said entry was ordered by said board and the same was made, appellee was present and entered a special appearance and filed written

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objections to said entry, upon the ground that the board had no jurisdiction. Appellee, in compliance with the order of the board, filed his answer on December 7, and on the same day appellant filed a reply. Afterwards, on December 11, appellee filed objections in writing to the jurisdiction of the board of the subject-matter of the action. These objections were overruled by the board, and the trial was commenced and proceeded from day to day until December 13, when appellee objected to the board hearing further evidence in said cause for the reason that the regular term expired the day before, December 12, and the board had not been called in special session by the auditor. The objection was overruled, and the board proceeded with the trial from day to day until December 15, when final judgment was rendered in favor of appellant, from which appellee appealed to the court below, where he filed a motion to vacate the judgment of the board and dismiss the proceeding for the following reasons:

"1. That said board did not acquire jurisdiction of said cause for the reason that no notice of the filing and pendency of said contest was served on two members of said board.

"2. That said board did not meet at the time stated in the notice to appellee.

"3 That said board did not meet in pursuance of any notice by the auditor, served on the members thereof, and did not meet at the time fixed by the auditor in the notice served on one of the members of said board, the said Daniel King.

"4. That said board of commissioners assumed jurisdiction of said proceedings by virtue of their being in session at their regular December session, and by force or virtue of no notice or summons convening them in special session.

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"5. That said board, over the objection of the contestee, continued said proceeding beyond their said regular term, and assumed to and did take action and render final judgment after the expiration of said regular term. Wherefore said contestee says the board of commissioners had no jurisdiction of said cause at the time of any of the proceedings had or orders entered therein before said board, and he moves the court that said judgment be vacated and said proceeding dismissed," which motion was sustained by the court and said cause dismissed, to which appellant excepted at the time.

The errors assigned call in question the action of the court below in sustaining said motion.

It will be observed that the only question presented is whether the board of commissioners had jurisdiction over the subject of the action.

It is a general rule that statutes providing for contesting elections should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. *Hadley v. Gutridge*, 58 Ind. 302. This rule of construction is to be kept in view in the determination of the question presented by the appeal.

It is shown by the record that appellant complied with all the requirements of the statute, and was entitled to have his action against appellee tried. The cause of the failure of the board to meet at the time fixed by the auditor is fully shown, but whatever the cause may have been, it is evident that appellant was not responsible therefor. \

The notice to the board was served on King and Robbins, who were then members of the board, and on Knox, who had been a member, and was claiming to hold until December 3, the first day of the Decem-

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ber term of the board. He was a *de facto* member of the board when served with the auditor's notice. The board of county commissioners is not dissolved by one member going out and another coming in. *Chapman v. County Com'rs*, 79 Maine 967, 9 Atl. 728. Bond and Stitt, who sat in the trial of the cause, were the successors of Robbins and Knox, respectively, and the board having had the proper notice, no new or further notice was required to be served on the new members. Besides, if the notice to the board to meet in special session and try an election case has not been served, but the members appear at the time and place fixed to try the same, thus waiving the service of the notice, neither the contestor nor contestee can object to such want of service.

It is not the service of the notice that gives the board jurisdiction when they meet in special session. If the auditor issues a notice to them, fixing the time and place to meet, and they waive the service of the notice by appearing, no one can successfully complain of the want of service on the commissioners. *Jussen v. Board, etc.*, 95 Ind. 567, 573; *State, ex rel., v. Board, etc.*, 104 Ind. 123, 129; *Prezinger v. Harness*, 114 Ind. 491, 494; *White v. Fleming*, 114 Ind. 560, 574.

The better practice is for the notice to contain the names of the members of the board, but if it states their names incorrectly, or names the wrong persons, and the legal members of the board attend, the special session will be lawful. The fact that the commissioners, Bond and Stitt, were not served with a notice issued by the auditor is not material, if the board of commissioners, when they tried this case, had jurisdiction in other respects.

The other reasons assigned by appellee in his motion to dismiss, present a more difficult question. The record shows that the board was prevented from meet-

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ing on November 30 by the restraining order of the Miami Circuit Court, and that otherwise Robbins and Knox would have met at the time named and proceeded with the trial of the five contested election cases named in the notice. The final judgment of the circuit court was not rendered until December 3, when it was adjudged that Stitt and not Knox was the commissioner from the first district, and the injunction against Knox was made perpetual. The December term of the said board commenced on Monday, December 3, the day upon which said final judgment was rendered by the circuit court. The board met in regular session on said day, and continued transacting general business, before the board, until December 6, when the *nunc pro tunc* entry was ordered and made in this cause, which is set forth in the record.

Original jurisdiction to try contests for township offices is vested in the board of commissioners. It was the legislative intent to compel a speedy trial and determination of this class of cases, and for that reason it was provided by section 6316, R. S. 1894 (4760, R. S. 1881), that the auditor should call a special session of the board of commissioners when a statement of contest was filed.

We are of the opinion that when the auditor has issued the notice to the board of commissioners and the contestee, required by section 6316 (4760), *supra*, and said contestee has been served, and the board of commissioners fail to meet in such special session, and the auditor does not call another special session to try said cause before the next regular session of the board, that said cause may be tried at such regular session. And if all of said contests are not disposed of at such regular term, it is the duty of the auditor to call a special session under the provisions of section 6316 (4760), *supra*, to try the same. If this is a correct

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proposition, as we believe it is, the board had jurisdiction to try this cause and render judgment therein at its regular term.

It has been held that where the law fixes the time and place for holding a court of inferior jurisdiction, the failure to meet at the time and place designated will, ordinarily, in the absence of a controlling statute, result in a lapse of that particular term of court. *Loesnitz v. Seelinger, Treas.*, 127 Ind. 422, 427. In such case, however, all the pending business remains in said court for trial at the next regular term. Even under this rule, if the special term to meet on November 30 lapsed on account of the failure of the board to meet on that day, then the board had jurisdiction to try said cause at the regular December term.

The trial extended beyond the time fixed for the regular term of the board, but this did not render the judgment either void or voidable, but the same was valid under the provisions of section 1442, R. S. 1894 (1379, R. S. 1881). That section provides that, if at the expiration of any term of court the trial shall be progressing, said court may continue its sitting beyond such time * * * and in such case the term shall not be ended until the cause shall finally have been disposed of by the court. This section is applicable to the board of commissioners when sitting as a court in the trial of a cause.

On December 12, the last day of said regular session, if there were any other election contests except the one on trial not disposed of, it was the duty of the auditor to call a special session of the board under the provisions of section 6316 (4760), *supra*, for the trial thereof.

Appellee contends that "the *nunc pro tunc* entry should be disregarded by this court. That while courts have the power to modify the judgments and

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orders during the time the proceeding is *in fieri*, yet this right cannot justify their falsifying the records by inserting therein by means of a *nunc pro tunc* entry proceedings that were never taken and papers that were never filed in the case."

So far as we have set out what appears from the *nunc pro tunc* entry made by the board of commissioners, we have no right to disregard it. The board of commissioners, in the trial of this case, was governed by the rules of law obtaining in the circuit court and had the same power to make and correct its entries. Section 6317, Burns' R. S. 1894 (4761, R. S. 1881); *Hadley v. Gutridge, supra*.

There is nothing before us showing that the board falsified its records, or brought into the record by means of the *nunc pro tunc* entry any proceeding except such as took place, or any papers except those that were filed. The presumption is that the entry was made upon proper evidence, and that it states the facts as they occurred in said cause.

It follows that the court erred in sustaining the motion to dismiss.

Judgment reversed, with instructions to overrule said motion and for further proceedings in accordance with this opinion.

THE MAINE GUARANTEE COMPANY v. COX ET AL.

[No. 17,578. Filed Feb. 13, 1896. Rehearing denied Oct. 15, 1896.]

146	107
153	903
146	107
164	827

BUILDING AND LOAN ASSOCIATIONS.—*Foreign Association Doing Business in this State Without Complying with the Prescribed Law.*—*Statute Construed.*—Under section 4464, et seq., Burns' R. S. 1894, authorizing foreign building and loan associations to do business in this State, unless there has been a compliance with such law, a foreign building and loan association cannot do a building

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and loan business in this State, such as the collection of dues, fines, premiums or other charges, but may, by virtue of the comity between the states, do business of a general character, such as loan money, take mortgage security therefor, and have judgment of foreclosure in case the debt thereby created is not paid unless a plea of abatement is interposed.

From the Madison Circuit Court. *Affirmed.*

- *Fishback & Kappes, E. E. Hendee, and F. B. Leland,* for appellant.

Henry, McMahan & Van Osdal, for appellees.

HOWARD, J.—The appellant, a foreign corporation, brought suit to collect a debt due from the appellee, Cox, and to foreclose a mortgage given to secure the same.

The court made special findings and conclusions of law in favor of the appellant, and rendered judgment for the full amount due, with foreclosure of the mortgage.

It appears from the special findings, and from the evidence, that the bond and mortgage sued on had been assigned to appellant by The People's Building, Loan and Savings Association, also a foreign corporation, having its place of business at Geneva, in the State of New York.

The court failed to find that either the appellant or its assignor had complied with the laws in force at the date of the contract sued on, authorizing foreign corporations to do business in this State; sections 3453, etc., Burns' R. S. 1894 (3022, etc., R. S. 1881); but did find that neither of said corporations had complied with the law now in force for the government of foreign building and loan associations (sections 4464, etc., Burns' R. S. 1894; Acts 1893, p. 274), and also found that neither of them has any organization in this State to do or transact business of any kind.

The court allowed appellant's claim for money lent

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on the mortgage and for tax liens paid, with interest to date of judgment; but refused to allow anything for amounts claimed by appellant by reason of bonus, premium, dues and other charges made by said building and loan association, under its rules and by-laws.

There is no doubt as to the power of the legislature to prescribe the conditions upon which a corporation, organized under and by virtue of laws of another state may do business in this State. *The Farmers', etc., Ins. Co. v. Harrah*, 47 Ind. 236; *Hockett v. State*, 105 Ind. 250; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 31 Pac. 1097; *Rose v. Kimberly*, 89 Wis. 545.

As shown in *Elston v. Piggott*, 94 Ind. 14, however, a foreign corporation, unless forbidden by law, may loan money in this State, take mortgage security therefor, and in the absence of a plea in abatement showing a failure to comply with the laws in relation to foreign corporations, may have judgment of foreclosure in case the debt thereby created is not paid.

It is also clear, we think, that though a foreign corporation may be prohibited from doing a particular kind of business in this State, unless there has first been a compliance with such regulations as may be prescribed by law; yet this will not make it unlawful for such corporation to do business here of a general character, as loaning money or collecting a debt. *Bouluare v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 South. 84.

The action of the court, consequently, in giving appellant judgment for the amount of its loan, together with the liens paid, and interest thereon to date, with a decree of foreclosure, was correct by virtue of the comity between the states.

But neither the appellant nor its assignor having any right as a building and loan association to do business in the State, there was no right on the

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part of either to collect any dues, fines, premiums, bonus, or other charges as such building and loan association; and the court did not err in refusing to allow such charges. See *Wiestling v. Warthin*, 1 Ind. App. 217.

The judgment is affirmed.

ON PETITION FOR REHEARING.

HOWARD, J.—Because the trial court found that neither the appellant nor its assignor had complied with the law then in force relating to foreign building and loan associations doing business in this State, counsel argue that it does not thereby follow that appellant's assignor had not complied with the law in force in relation to foreign corporations at the date of the contract and mortgage sued on. But the court did find that at the time of the trial neither association had any organization "of any kind or character in the State of Indiana as a building and loan association to do or transact business of any kind." From this finding it certainly follows that neither association had ever acquired any right under our laws to do business in the State. Their sole rights, if any, were based upon the comity between the states.

To do business in the State as a foreign corporation, it was necessary that appellant should have complied with the law in force at the time of the contract, or, at least, at the time of its attempted enforcement.

There is no doubt, as counsel insist, that if appellant's assignor had complied with the law in force at the date when the contract was entered into, the business so engaged in would have been lawful, and a recovery might have been had in accordance with the terms of the contract. In such a case, the company would have had a right to do business in the State, which, however, the court, in effect, finds it had not.

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The appellant was awarded a decree for all that it was entitled to; the finding in the record would not support a judgment for anything further.

The petition is overruled.

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[No. 17,854. Filed May 12, 1896. Rehearing denied Oct. 15, 1896.]

PLEADING. — *Argumentative Denial.*—An argumentative denial, if otherwise good, is sufficient to withstand a demurrer.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Documentary Evidence.*

—When it is attempted to incorporate a paper or document into a bill of exceptions by means of the words "here insert," the instrument must be so clearly identified that nothing remains for the clerk to do but to copy it in the bill at the place indicated.

SAME.—*Bill of Exceptions.*—*Evidence not All in Record.*—Where it appears from the bill of exceptions that the evidence is not all in the record, the Supreme Court will not consider and determine any question which depends for its proper decision upon the evidence.

From the Wabash Circuit Court. *Affirmed.*

France & Dungan and *Watkins & Beckel*, for appellant.

J. B. Kenner and *U. S. Lesh*, for appellees.

JORDAN, J.—Action by the appellant to set aside a sheriff's sale and enjoin appellee from asserting any title to the lands sold to him thereunder. This is the second appeal of this cause. See *Boos v. Morgan*, 130 Ind. 305. Upon this latter appeal several of the propositions relied upon by appellant to maintain his action were decided adversely to him.

A brief summary of the facts alleged in the complaint, is that the appellant is the owner of the real estate in question by virtue of a purchase from one

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Lucas in 1878; that in 1876 Milton Hendrix recovered a judgment against Lucas, who was then the owner of the land in dispute; that the judgment was assigned to the appellee; that thereafter the latter caused an execution to be issued thereon, and several tracts of land were sold thereunder at sheriff's sale to the appellee in satisfaction of the judgments, and that the attorneys for him receipted for the purchase-money for the land sold at said sale; that no return was made by the sheriff of the sale in question, and that afterwards the appellee, without any other disposition of the property levied upon by the sheriff, caused that officer to levy upon and sell the real estate in dispute, which appellee purchased at said sale and received a sheriff's deed therefor.

An answer to the complaint was filed in three paragraphs, the first being a general denial.

A trial upon the issues joined resulted in a finding in favor of the appellee, and over appellant's motion for a new trial, based alone upon the grounds that the finding of the court was contrary to both the law and the evidence, and not supported by sufficient evidence, judgment was rendered against the appellant.

Two errors are assigned:

1st. That the court erred in overruling the demurrer to the third paragraph of answer.

2d. That the court erred in overruling the motion for a new trial.

The third paragraph of the answer set up facts tending to negative the allegations of the complaint that the judgment, upon which the sheriff's sale in controversy was based, had been satisfied thereby, and this contention appears, from the complaint, to be the real *gist* of the action. The paragraph was in the nature of an argumentative denial of the material matter in the complaint, and the facts therein averred could

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have been given in evidence under the general denial which had been pleaded. Nevertheless, the appellee had the right to plead them specially, and therefore the court did not err in overruling the demurrer to the third paragraph of the answer. *Loeb v. Weis*, 64 Ind. 285; *Stoddard v. Johnson, Treas.*, 75 Ind. 20; *Strattan v. Elliott*, 83 Ind. 425; *Leary v. Moran*, 106 Ind. 560.

Consideration of the overruling of the motion for a new trial depends upon the evidence being all in the record by the bill of exceptions. Appellee contends that the transcript discloses that all of the evidence given upon the trial is not incorporated into the bill of exceptions. The bill states that: "The plaintiff, to maintain the issues on his behalf, introduced the following written evidence."—"Plaintiff, to support his side of the cause, offered and read in evidence the following executions—marked—(Here insert) and also offered and read in evidence copies of judgments of the Huntington Circuit Court, together with notices of sale and the return of the sheriff as follows: (H. I.) All copies of judgments introduced in evidence, all returns of the sheriff on executions, and which judgments are as follows (Clerk H. I.): And the plaintiff, to support his side of the case, introduced as a witness Anthony Weber, who testified as follows:" At this point in the transcript, instead of the evidence of the witness named being set out, a number of executions and other documents are set forth. As there is nothing to show, or indicate, that these executions and documents are the identical ones introduced in evidence, and which the clerk was directed to insert in the bill, the question as to this fact becomes only a matter of conjecture. Again, the judgments stated to have been given in evidence do not appear in the bill

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of exceptions. It is the settled law of this State that when it is attempted to incorporate a paper or document into a bill of exceptions, under the provisions of the code, by means of the words "here insert," the instrument must be so clearly identified that nothing remains for the clerk to do but to copy it into the bill at the place indicated. It must be so described, or designated, that when the transcript is read, it can be recognized as the one described and ordered to be inserted. This seems to be rendered necessary to avoid imposition upon the clerk through mistake or design. *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; Elliott's App. Proced., section 818.

Again, as it appears from the bill of exceptions that the judgments recited to have been given in evidence are omitted, it follows that all of the evidence is not in the record; hence we cannot consider and determine any question which depends for its proper decision upon the evidence in the cause. *Collins v. Collins*, 100 Ind. 266, and cases there cited; *Jennings, Gdn., v. Durham*, 101 Ind. 391.

For the reasons stated herein, we are precluded from reviewing the court's action in denying the motion for a new trial.

Judgment affirmed.

POTTER v. THE KNOX COUNTY LUMBER COMPANY.

[No. 17,866. Filed October 16, 1896.]

148	114
159	517
148	114
161	683

PLEADING.—*Master and Servant.*—*Negligence of Master.*—*Sufficiency of Complaint.*—A complaint states the facts essential to a master's liability for injuries to his servant sufficiently to withstand a demurrer, where it alleges that the plaintiff was employed as sawyer in defendant's mill; that when he had been at work there but three days it became necessary in the course of his employment to pass from one part of the mill to another; that near the

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passageway along which plaintiff was compelled to go was a rapidly revolving shaft, in which was a set-screw projecting a distance of three inches, which defendant had negligently left unguarded; that in passing the revolving shaft the projecting set-screw caught and so injured plaintiff's foot that it had to be amputated; that defendant well knew the defective and dangerous condition of shaft and set-screw, but did not inform the plaintiff of the danger, and that the plaintiff was without fault, having no knowledge of the danger.

From the Knox Circuit Court. *Reversed.*

. *W. A. Cullop and C. B. Kessinger*, for appellant.

W. H. DeWolf, for appellee.

HOWARD, J.—It is contended, on this appeal, that the trial court erred in sustaining appellee's demurrer to appellant's complaint.

The complaint is for damages on account of an accident to appellant in appellee's saw mill. Appellant was employed as a sawyer by appellee, and had been at work but three days at the time of his injury. In the course of his employment it became necessary for him to adjust a belt upon a pulley. To do this he had to pass from the upper to the lower part of the mill. He passed down carefully and by the usual way provided by appellee for him to go. Along and close to this passageway was a shaft which revolved very rapidly; and in the end of the shaft, for the purpose of holding it in place, was a set-screw, unguarded, which projected from the shaft a distance of three inches. The set-screw was of iron, and small, and revolved so rapidly with the shaft that it could not be seen. As appellant passed by the shaft, in the exercise of all due care, the set-screw, in its revolution, caught and struck his foot and so injured it that the foot had to be amputated. It is alleged that the appellee was negligent in using a set-screw in said shaft which was defective in this, that it projected three inches from the

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shaft and was unguarded; that appellee knew of the existence and defective condition of the set-screw, and knew that it was unsafe and dangerous, but took no means to render the same safe for the use of its employes, by covering it or otherwise, and did not inform appellant of the danger; that appellant did not know of the existence of the screw or that it projected from the shaft for three inches, or any other distance, and on account of his recent employment had no means or opportunity of learning of the existence or condition of said set-screw.

A set-screw is defined by Webster to be, "A screw, sometimes cupped or pointed at one end, and screwed through one part, as of a machine, tightly upon another part, to prevent the one from slipping upon the other."

It would seem that, by the strict canons of construction, the allegations of the complaint were sufficient to withstand the demurrer urged against it. The objections made by counsel, while well taken by reason of the extreme vagueness of the complaint, are, however, such as should have been reached by a motion to make more specific. *Peerless Stone Co. v. Wray*, 143 Ind. 574.

In Wood's Master and Servant (2d ed.), section 414, it is said: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1st, that the appliance was defective; 2d, that the master had notice thereof, or knowledge, or *ought* to have had; 3d, that the servant did not know of the defect, and had not equal means of knowing with the master."

We are of opinion that these propositions are sufficiently, though somewhat indefinitely, alleged in the complaint; and we see no reason why the case should not have gone to trial, to determine whether the evi-

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dence should establish the truth of the allegations so made; that is, whether the set-screw, as used in the shaft and unguarded, was defective and dangerous; whether such defect was known or ought to have been known to the appellee; and whether the appellant knew of the defect, or had equal means and opportunity with the appellee of knowing it. The appellant did not assume a risk of which he had no knowledge, and of which he could have had no knowledge. *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. Rep. 251; *Lake Shore, etc. R. W. Co. v. Kurtz*, 10 Ind. App. 60.

It may be added that, on account of diffuseness and uncertainty of statement in the complaint, it was only with much hesitation that we were able to arrive at the conclusion to hold it good. The alleged negligence of the appellee and the nature of the defect complained of, are not stated with that clearness and definiteness which are always desirable in pleading.

The judgment is reversed, with instructions to overrule the demurrer to the complaint.

GRIFFITH v. SLINKARD.

[No. 17,968, Filed October 16, 1896.]

PROSECUTING ATTORNEY.—*Not Liable for Maliciously Procuring Indictment.*—A prosecuting attorney is not liable in an action for malicious prosecution, for participation by him in procuring an indictment maliciously and without probable cause.

SAME.—*Reading in Open Court a False Indictment.*—*Not Defamation.*—The reading by the prosecuting attorney, in open court to the officers thereof and in the hearing of others, of an indictment, even though it be false and improperly procured, is privileged and cannot be the foundation of an action for defamation.

From the Greene Circuit Court. *Affirmed.*

Griffith v. Slinkard.

Cavins & Cavins and Davis & Moffett, for appellant.

Emerson Short and W. L. Slinkard, for appellees.

MCCABE, J.—The circuit court sustained a several demurrer to each of the two paragraphs of the complaint, and plaintiff, the appellant, refusing to amend and electing to stand upon his complaint, the defendant recovered judgment upon the demurrer that the plaintiff take nothing by his complaint. The rulings upon said demurrer are called in question by the assignment of errors.

The substance of the complaint is as follows:

“1st. Par. Plaintiff, for amended complaint complains of the defendant, and says that on October 4, 1893, during the September term of the Greene Circuit Court, while a grand jury of said county was in session inquiring into crimes, etc., the defendant was the regularly elected and qualified prosecuting attorney for the fourteenth judicial circuit of said State and for said county of Greene, the same being one of the counties of said circuit; that during said session of said grand jury it became their duty to inquire into a charge of crime presented them against one John Mullins for having feloniously and purposely set fire to and burned a certain barn, of the value of \$400.00, the property of said Mullins, the said property being insured by the Indiana Underwriters Insurance Company in the sum of \$400.00, with intent to cheat and defraud said insurance company; that said grand jury voted and decided to present an indictment against said Mullins in due form charging him with said crime; that said Slinkard, acting as prosecuting attorney, but maliciously, wrongfully, and willfully intending to injure plaintiff, represented to said grand jury that he was able to present evidence that would show probable cause for and justify an indictment against

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said plaintiff for said crime jointly with said Mullins; that said grand jury investigated and heard said pretended evidence; that there was no evidence whatever against this plaintiff in any way whatsoever tending to connect said plaintiff with the commission of said crime, and that he in fact was not guilty thereof, nor of complicity therein; that said grand jury thereupon voted, decided and determined not to present or return any indictment against said Griffith, plaintiff herein, charging him with said crime, of which action and determination of said grand jury said defendant at the time well knew; that thereupon said grand jury directed said Slinkard to prepare an indictment against said Mullins charging him with said crime, but did not direct him to include this plaintiff in said indictment; that said indictment against said Mullins, charging him with said crime, was prepared by said Slinkard and by said grand jury returned into open court, but that said defendant, well knowing all the foregoing action and determination and decision of said grand jury, and maliciously intending to harass and injure said plaintiff, did knowingly, willfully and without any probable cause whatever, and without any authority or direction from said grand jury, and without its knowledge or consent, or without the knowledge or consent of any of its members, insert the name of said plaintiff in said indictment at the time the same was so prepared by said Slinkard, causing said indictment to jointly charge said Mullins and Griffith with said crime, and furnish the same in said form to said grand jury, whose foreman, without reading the same or knowing the plaintiff's name was included therein, indorsed the same 'a true bill,' and the same in said form was presented in open court as aforesaid. But the defendant, well knowing all the foregoing action, and will-

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fully, maliciously and without probable cause in his capacity as attorney for the State, caused a warrant to be issued for the arrest of said plaintiff on said indictment, and caused said plaintiff to be arrested thereon, and compelled him to enter into his recognizance for his appearance in said court from day to day and term to term willfully, maliciously and without probable cause compelled plaintiff to appear from day to day and term to term to answer said charge for a period of nine months, and dismissed said pretended cause and entered a motion to *nolle prosequi* the same, which motion was sustained and said prosecution terminated."

The theory of the first paragraph is in the nature of a complaint for malicious prosecution.

And it may be first noted that it states enough to show that there was an indictment against the appellant returned into open court by the grand jury, indorsed by the foreman a true bill. It takes at least five of the grand jurors to concur in the finding of an indictment, and it must be indorsed by the foreman a true bill. Burns' R. S. 1894, section 1738 (R. S. 1881, 1669). The statute further requires it to be returned into court, and if the foreman has not signed his name to the indorsement aforementioned, the court must require him to do so, and also require the prosecuting attorney to sign it in the presence of the grand jury, if he has not already done so. It is then required to be filed by the clerk indorsing thereon the date of filing and record the same. Burns' R. S. 1894, section 1741 (R. S. 1881, 1672).

All this the paragraph unavoidably shows has been done as to the indictment in this case. It shows also that the grand jury returned the indictment without any evidence against the appellant. It shows that they heard the pretended evidence against him, and

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that there was no evidence tending to establish his guilt, and that they voted not to indict him, and yet the appellee, as prosecuting attorney, maliciously wrote his name into the indictment without the knowledge or consent of the grand jury. And yet it is shown that it was returned by the grand jury into open court and filed. This record must be held to import absolute verity that the grand jury did find and return into open court the alleged indictment. However reckless and malicious the grand jury may have acted in returning an indictment against another without evidence or probable cause, they are not liable to the injured person in an action for malicious prosecution. *Hunter v. Mathis*, 40 Ind. 356.

The question remains, is the prosecuting attorney any more liable for his alleged participation in procuring the indictment maliciously and without probable cause?

In the *State v. Henning*, 33 Ind. 189, at page 191, this court said: "The turning point in the case is this: Is a prosecuting attorney an officer intrusted with the administration of justice? He is a judicial officer, created by the constitution of the State. 1 G. & H. p. 47, section 11. He is the law officer of the court to whom is intrusted all prosecutions for felonies and misdemeanors. 2 G. & H. p. 430, section 4. He is the legal adviser of the grand jury. We think he is 'an officer intrusted with the administration of justice.'"

The prosecuting attorney therefore is a judicial officer, but not in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said

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duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it." Townsend Slander and Libel (3d ed.), section 227, pages 395-6.

It was held in *Parker v. Huntington*, 2 Gray (Mass.) 124, that an action against a district attorney and another person for maliciously contriving to have the plaintiff indicted for perjury, they knowing that he had not committed it, and by their false testimony obtaining a verdict of guilty against the plaintiff, which was afterwards set aside, cannot be maintained.

There is therefore no more liability against the prosecuting attorney than there is against the grand jury for the return of an indictment maliciously and without probable cause.

The second paragraph is a complaint for libel in reading the contents of the same indictment in open court to the officers thereof and in the hearing of others.

It is alleged to be false, and the publication thereof by said reading is alleged to be malicious.

In the same section of Townsend, from which we have just quoted, it is said: "No action will lie for defamatory matter contained in a presentment of a grand jury."

In *Hartsock v. Reddick*, 6 Blackf., at pages 255-6, it is said by Dewey, J., speaking for the court, that: "A complaint made to a justice of the peace, or other qualified magistrate, for the purpose of enforcing justice against an individual therein accused of crime, does not subject the person making the accusation to an action for slander or libel. The foundation of this

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principle is the necessity of preserving the due administration of public justice. Few would be found to accuse, if the institution of an unsuccessful prosecution subjected the prosecutor to an action for words spoken or written. *Cutler v. Dixon*, 4 Rep. 14; *Lake v. King*, 1 Saund. 131; *Johnson v. Evans*, 3 Esp. R. 32. And it makes no difference whether the charge be true or false; or whether it be sufficient to effect its object or not; if it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action for defamation. *Buckley v. Wood*, 4 Rep. 14; *Lake v. King*, *supra*; 1 Saund. 131 n. 1." To the same effect is 1 Hilliard on Torts (3d ed.), p. 19, section 8.

We are, therefore, of opinion that neither paragraph stated facts sufficient to constitute a cause of action.

The circuit court did not err in sustaining a demurrer to each paragraph of the complaint.

The judgment is affirmed.

 SMITH v. MCCLURE.

[No. 17,814. Filed October 20, 1896.]

APPEAL AND ERROR.—*Practice*.—*Action to Set Aside a Judgment on the Ground of Unsoundness of Mind of Defendant*.—In an action to set aside a judgment on the ground that defendant was of unsound mind at the time of the rendition thereof, it is necessary to show by a preponderance of the evidence that the judgment defendant was of unsound mind, as alleged; and where the evidence upon such question was conflicting in the trial court, under the well settled rule, this court will not weigh the evidence.

From the Harrison Circuit Court. *Affirmed*.

Cook & Ridley, for appellant.

W. N. & R. J. Tracewell, for appellee.

146	123
151	181
146	123
165	12

Smith v. McClure.

MONKS, C. J.—This action was brought by appellant to set aside and vacate a judgment and decree rendered in the court below in favor of appellee against one John T. Smith and appellant, his wife.

It is alleged in the complaint to set aside said judgment and decree, that at the time said action was commenced by appellee upon said note and mortgage, and until after the judgment and decree were rendered, that she was a person of unsound mind and incapable of managing her own estate or attending to any business whatever; that she was of sound mind when she commenced this action. A meritorious defense to the original action is also stated in said complaint. Appellee filed an answer of general denial. The cause was tried upon oral and documentary evidence, and the court found for appellee, and, over a motion for a new trial, rendered judgment against appellant.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. The causes assigned for a new trial were:

1. The decision of the court is not sustained by sufficient evidence.

2. The decision of the court is contrary to law.

As the sufficiency of the complaint is not challenged, we do not determine that question.

To entitle appellant to a finding in her favor, she was required to prove by a preponderance of the evidence that she was of unsound mind, as alleged. The evidence upon the question of unsoundness of mind was conflicting, and under the well settled rule this court will not weigh the evidence. *Laurence v. Van Buskirk*, 140 Ind. 481, and cases cited; *Cabinet Makers' Union v. City of Indianapolis*, 145 Ind. 671, and cases cited.

The judgment is affirmed.

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ALLEY v. THE CITY OF LEBANON ET AL.

[No. 17,548. Filed October 20, 1896.]

146	125
147	701

146	125
148	90
148	91
149	518

MUNICIPAL CORPORATION.—*Public Improvement.—Sewers.—Injunction.*—An action will not lie to enjoin the collection of a sewer assessment under sections 4288–99, Burns' R. S. 1894, which provide a remedy by injunction before the making of the contract and by appeal in case a precept is issued for the collection of the assessment, unless the common council was absolutely without jurisdiction to enter into the contract for the building of the sewer.

146	125
153	574

SAME.—*Common Council.—Public Improvements.—Sewers.*—Where all the proceedings for the construction of a sewer and the making of assessments are in strict compliance with sections 4288–4299, Burns' R. S. 1894, a city council has jurisdiction to make a contract for a general sewer.

SAME.—*Common Council.—City Commissioners.—Public Improvements.—Sewers.—Statute Construed.*—Under sections 4273–4275, Burns' R. S. 1894, providing a method by which the common council or town board is guided in making assessments upon the property benefited by sewer improvements, such council or town board is not required to submit the matter to the city commissioners for appraisalment of benefits and damages to the property affected by the proposed improvements.

From the Boone Circuit Court. *Affirmed.*

Ralston & Keefe and *Abbott & Ratcliff*, for appellant.

Artman & Lewis, for appellees.

HOWARD, J.—This was an action by the appellant to enjoin the collection of a sewer assessment. The appellee City of Lebanon, having assigned to the remaining appellees, contractors, all assessments for the construction of the sewer, filed in the court below her disclaimer to the appellant's complaint. The other appellees filed their answer, in which they set out in full the proceedings of the city council for the con-

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struction of the sewer and the making of the assessments.

The evidence was heard, and the facts found specially by the court. The findings so made show that all the proceedings for the construction of the sewer and the making of the assessments were, as is also admitted by counsel, in strict compliance with the provisions of the act approved March 8, 1889 (Acts 1889, p. 237), and the amendments thereto (Acts 1891, p. 323), for the making of street and alley improvements and the building of sewers, known as the Barrett Law. (Sections 4288-4299, Burns' R. S. 1894.)

Many propositions are ably discussed in the elaborate briefs of counsel, as they were also in the oral argument, but we are of opinion that the only question that need be considered is, whether the common council had jurisdiction to enter into the contract for the construction of the sewer.

In *Robinson v. The City of Valparaiso*, 136 Ind. 616, which was also a case under the Barrett law, certain property owners had sought to enjoin the collection of sewer assessments on account of the alleged defective construction of the sewer. It was there held, in accordance with the provisions of the statute, that an injunction might, in proper case, be had "upon the proceedings prior to the making of any such improvements." It was, however, also held that "from the time that work begins under a lawful contract, vested rights attach; and the faithful completion of the work is placed by the law in custody of the city authorities, chosen by the people and clothed with power to care for the common welfare;" but that if a property owner refuses to pay his assessment, and a precept is issued for its collection, an appeal may be had; on which appeal "all questions from the making of the contract to

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the report of the engineer on the final estimate are brought in review."

It might be said, therefore, that, in the case at bar, the appellant not having brought her injunction proceedings before the making of the contract for the sewer, and there being provided a right of appeal in case a precept is issued for the collection of the assessment made against her, the present action cannot lie. And this would be true unless it could be shown that the common council was absolutely without jurisdiction to enter into the contract for the building of the sewer. And this, indeed, is what counsel for appellant contend for.

The basis of this contention is that by the act to regulate sewer improvements in towns and cities, in force March 4, 1893 (Acts 1893, p. 332; sections 4273-4275, Burns' R. S. 1894), sewers are classified into local and general sewers; the cost of the former to be paid by the abutting property owners, and so much of the cost of the latter as exceeds the cost of a local sewer to be paid by the owners of all property benefited, including the abutting property. The act further provides that in making the assessments for local sewers or their equivalents, the town board or common council shall be governed by the law in relation to assessments for street improvements, except that the whole cost, including that for street and alley crossings, shall be assessed against the property owners; and that in assessing that part of the cost of a general sewer, over and above the cost of an equivalent local sewer, the board or common council shall be governed by the statutes relating to the assessment of benefits in the laying out of streets.

We are able to perceive nothing in the foregoing act that can affect the jurisdiction of the common council in letting the contract here under consideration. The

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Barrett law specifies all the steps to be taken prior to and including the letting of the work. Counsel admit that all such steps were taken, as, indeed, the court also expressly finds. The statute of 1893 has reference only to the proper mode of making the assessments after the contract has been made and the work completed. If the assessments have not been made as required by law, the court may undoubtedly compel a proper assessment to be made; but this furnishes no reason to show that the common council did not acquire jurisdiction to enter into the contract for the work.

Counsel argue that by the act of 1893 the common council were required, before taking any steps towards the construction of the sewer, to submit the matter to the city commissioners for an appraisalment of the benefits and damages to the property to be affected by the proposed improvement. Such a proceeding would be quite impracticable, and there is nothing in the act to justify counsel's interpretation. The assessments cannot be made until the contract is let and it becomes known how much the work is to cost. Besides, it is plain, from the provisions of the statute, that the legislature intended only to provide a method by which the common council or town board should be guided in making assessments upon the property benefited by the work. In case of a local sewer, or its equivalent, the benefits are to be assessed on the abutting property, by the front foot, as in case of street improvements, except that the whole cost shall be assessed to the abutting property, and none to the city or town; while in case of a general sewer, such as that in the case before us, the excess of cost over the cost of a local sewer is to be assessed to all the property benefited, including the abutting property; and in making this last assessment the town board or com-

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mon council are to be governed by the same provisions of law that prevail in making assessments for the laying out of streets; that is, the actual benefits and damages, and not merely the frontage, area or value of property are to be considered. The assessment, however, in every case is to be made by the town board or common council, and not by the city commissioners or any other body.

The assessment in this case, as appears from the findings of the court, was made against each lot or part of lot benefited according to such benefits and to the fair proportion of the cost of the work. There is nothing to show that this end was not reached in the manner provided by law; and we must presume that it was.

The judgment is affirmed.

BAILEY ET AL. v. RINKER ET AL.

[No. 17,888. Filed October 21, 1896.]

EXECUTORS AND ADMINISTRATORS.—Sale of Real Estate Without Petition or Order of Court.—A domestic executor may sell real estate without a petition or order of court where the will directs the sale thereof and empowers the executor to make such sale. *p. 133.*

SAME.—Sale of Real Estate by Foreign Executor.—Failure to File Authenticated Copy of Appointment.—Jurisdiction of Subject-matter.—The failure of the circuit court to require a foreign executor to file an authenticated copy of his appointment, and of the will and foreign probate thereof, before granting an application to sell real estate, is an irregularity, but will not amount to such an error as to deprive the court of jurisdiction over the subject-matter. *p. 135.*

JUDGMENT.—Collateral Attack.—Pleading.—Complaint.—Where it is sought to collaterally impeach a judgment for want of notice to the parties against whom it is rendered, it is not sufficient to allege generally the want of such notice, but the complaint must allege what the record of the judgment sought to be impeached discloses on the subject, or the complaint will be bad. *p. 135.*

146	129
148	78
148	608
148	609
149	77
150	449
150	451
150	554
151	191
151	196
152	489
146	129
154	240
146	129
165	289
146	129
166	54

Bailey *et al.* v. Rinker *et al.*

SAME.—*Collateral Attack.—Pleading.—Complaint.*—An allegation that none of the heirs or legatees of a testator were made parties to the petition of the executor to sell real estate, is not equivalent to an allegation that they were not parties to the proceedings as disclosed by the record, essential to a complaint collaterally impeaching the decree of sale upon the ground that they had no legal notice of the filing of the petition and the pendency of the action. *p. 138.*

From the Morgan Circuit Court. *Affirmed.*

Oscar Matthews, for appellants.

Holstein & Barrett, M. H. Parks, W. S. Shirley, C. G. Renner, and W. R. Harrison, for appellees.

MCCABE, J.—This was a suit seeking to set aside an executor's sale and to obtain partition between the heirs and legatees of Lewis Bailey of certain lands situate in Morgan county, Indiana, which are particularly described and of which said Lewis died seized.

The circuit court sustained a demurrer to the complaint by each of three of the defendants for want of sufficient facts, and the plaintiffs, refusing to plead over or amend and standing upon their complaint, the court adjudged that they take nothing by their complaint.

The correctness of the ruling on such demurrers is the only question presented by the assignment of errors. After stating that said Lewis Bailey departed this life in Cowley county, Kansas, testate, on the 15th day of July, 1880, where he had long resided, naming all the heirs at law he left and their degree of relationship to the deceased, and the share each was entitled to in the land mentioned under the will which it is alleged that the deceased left, in which he directed: "that after all my just debts are paid, that all my real estate of every kind and nature be sold by my executor, and all of the proceeds of such sale be invested in good interest-bearing securities, or bonds, and that

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my wife, Keziah Bailey, and my daughter, Sarah A. Bailey, have the interest on said investment during their natural lives, the principal to remain intact. And at the death of my said wife and daughter it is my will and I do hereby declare that all my property, except as hereinafter or otherwise provided, shall be divided, share and share alike, between my children, the child or children of a deceased child of mine to take the share its or their parent would have taken." G. L. Rinker was nominated as executor of the will. It is then alleged that the widow surviving said Lewis, Keziah Bailey, died in Cowley county, Kansas, on the — day of June 1885, and his said daughter, Sarah A. Bailey, died at the same place on the — day of —, 1892. Then it is alleged that said Rinker, as such executor, on November 8, 1880, filed a petition in the Morgan Circuit Court, praying for an order to sell the above described real estate, whereupon such proceedings were had; that said court did, upon the 29th day of November, 1880, grant an order to sell said real estate at private sale; that on the 10th day of September, 1886, the said Rinker sold to the defendant, Mary J. Kitchen, the following part of said real estate, which is described. Whereupon the said executor executed and delivered to said Kitchen a deed of conveyance, which deed is recorded in the record of deeds in the office of the recorder of Morgan county, Indiana; that on the 9th day of January, 1894, the said Rinker sold the remainder of said land to the said defendant, Jennetta A. Rinker, and on the 5th day of February, 1894, reported the said sale to said court, and executed and delivered to said Rinker a deed of conveyance therefor, which deed is also recorded in the deed record in said recorder's office; that said sales to Kitchen and Rinker were void for the following reasons, to-wit: That said testator, at the time of his

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death, and a long time prior thereto, was a non-resident of the State of Indiana, and was a resident of the State of Kansas. And the petition asking for the order to sell aforesaid was an *ex parte* petition, and on the presentation thereof said executor procured the order to sell aforesaid without making the heirs or legatees of said Lewis Bailey, or any of them, parties to said petition, and without giving them, or either of them, any notice whatever of the filing of said petition and the pendency of said cause. And the said executor did not, prior to the time of filing said petition and obtaining said order, nor has he at any time since filed or caused to be filed an authenticated copy of said will and the probate thereof, together with his appointment as such executor in the said circuit court of Morgan county, Indiana; and that he did not, prior to the filing of said petition, and prior to the entry of said order of sale, nor has he at any time since, procured and presented said will or a copy and the probate thereof to the circuit court of Morgan county, Indiana, and have the same adjudged by the Morgan Circuit Court to be the last will and testament of said Lewis Bailey, nor did he, prior thereto, nor has he at any time, caused said will and the probate thereof to be probated and recorded in the order book of said Morgan Circuit Court, or upon any of the records of said court.

And plaintiffs further aver that said sales are void for the further reason that it is provided in said will that at the death of the said testator's wife, Keziah, and daughter, Sarah A. Bailey, all his property, both real and personal, should be divided, share and share alike, between his children, the child or children of a deceased child to take the parent's portion; that no power was conferred on the executor by the will to sell or dispose of any of said real estate

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after the death of the beneficiaries therein named, Keziah and Sarah A. Bailey; but that in violation of the express terms of said will said sales were made after the death of said Keziah and Sarah A. Bailey.

It is also alleged that Jennetta A. Rinker mortgaged her portion of said real estate to Hiram Brown, which mortgage, it is alleged, has been recorded, and that the same has been assigned to the defendant, Clark N. Smith. A part of the relief sought is to set aside this mortgage because, as it is claimed, the executor's sales were void.

The invalidity of such sales is sought to be maintained on the ground that if they rest on the power of the foreign executor, conferred on him by the terms of the will, then the sales are void because a certified copy of the will and the foreign probate thereof had not been allowed by the Morgan Circuit Court as the last will of the deceased, and ordered by such court to be filed and recorded by the clerk thereof. And if such sales rest on the alleged order of the Morgan Circuit Court, then they are void because the heirs and legatees were not made parties to the petition to sell, and were not notified of the proceedings resulting in the order of sale.

In case of a domestic executor, where the will, as here, directs and empowers him to sell real estate, he may do so without a petition or an order of court. Burns' R. S. 1894, sections 2514, 2515 (R. S. 1881, 2359, 2360); *Munson v. Cole*, 98 Ind. 502; *Davis v. Hoover*, 112 Ind. 423.

Among other things, it is provided in our Statute of Wills as to foreign wills, that: "Such will or copy, and the probate thereof, may be produced by any person interested therein to the circuit court of the county in which there is any estate on which the will may operate; and if the said court shall be satisfied

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that the instrument ought to be allowed as the last will of the deceased, such court shall order the same to be filed and recorded by the clerk; and, thereupon, such will shall have the same effect as if it had been originally admitted to probate and recorded in this State." Burns' R. S. 1894, section 2763 (R. S. 1881, 2593). A foreign executor may sell or procure an order of sale of lands in this State by complying with our laws in the same manner that a domestic executor can. *Lucas v. Tucker*, 17 Ind. 41; *Rapp v. Matthias*, 35 Ind. 332.

It would seem, then, if a foreign executor attempts to make a sale of real estate in this State by virtue of the power to sell conferred on him in the will he must comply with the above quoted section of the statute.

A section of the decedent's act provides that: "When any executor or administrator shall be appointed without, and there shall be no executor or administrator within this State, the testator or intestate not having been, at the time of his death, an inhabitant thereof, the executor or administrator so appointed may file an authenticated copy of his appointment in the circuit court of any county in which there may be real estate of the deceased; after which he may be authorized by such court to sell real estate for the payment of debts or legacies in the same manner and upon the same terms as in the case of an executor or administrator appointed in this State, except as hereinafter provided." Burns' R. S. 1894, section 2519 (R. S. 1881, 2363).

This section authorizes the proper circuit court to make an order of sale upon the application of a foreign executor, precisely the same as a domestic executor or administrator, except that it requires the foreign executor to file an authenticated copy of his appointment in the circuit court.

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The failure of the circuit court to require the foreign executor to file an authenticated copy of his appointment and the foreign will to be allowed and recorded before granting the application to sell, may have been an irregularity or error, but such error did not deprive the court of jurisdiction over the subject-matter.

A judgment cannot be collaterally impeached, as is attempted to be done here, for a mere error, if the court rendering it had jurisdiction of the subject and parties. *State, ex rel., v. Morris, Aud.*, 103 Ind. 161; *Dowell v. Lahr*, 97 Ind. 46.

Therefore, the allegation of the commission of the error named was not sufficient to enable the appellant to collaterally impeach and set aside the order of sale.

The other ground for assailing and setting aside the order and sales thereunder is stated in the complaint in the following words: "and did, without any other authority, and without making said heirs and legatees, or any of them, parties to said petition, and without giving them, or either of them, any notice whatever of the filing of said petition and the pendency of said cause," did, on, etc., make the order of sale. It has long been settled in this court that where it is sought to collaterally impeach a judgment for want of notice to the parties against whom it is rendered, it is not sufficient to allege generally the want of such notice, but the complaint must allege what the record of the judgment sought to be impeached discloses on the subject, or the complaint will be bad.

In the *Exchange Bank v. Ault*, 102 Ind. 322, at page 327, it was accordingly said: "Where a party seeks, by complaint or cross-complaint, to impeach the judgment or decree of a court of superior jurisdiction, upon the ground that he had no legal notice of the pendency of the action wherein such judgment or decree was rendered, it is necessary that he should al-

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lege in his pleading what, if anything, is shown by the record in relation to the issue and service of process on him in such action. The Owen Circuit Court had jurisdiction of the subject-matter of such action, and we are bound to presume, in the absence of any averment to the contrary, that the court had acquired jurisdiction of the person of the cross-complainant, before it rendered the decree against him, which he asked the court, in the pending suit, to set aside and declare void. If the record of the former action shows, as we must presume that it does in the absence of any allegation to the contrary, that the court below had acquired jurisdiction of the person of Thomas B. Ault by the issue and service of a summons on him in such action before it entered the default and decree against him therein, of which he now complains, it is certain, we think, that he cannot impeach or avoid such judgment or decree in this collateral suit." To the same effect are *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, *supra*; *Shoemaker v. South Bend, etc., Co.*, 135 Ind. 471, 22 L. R. A. 332; *DePuy v. City of Wabash*, 133 Ind. 336.

And the same rule has been applied by this court correctly, we think, as to other matters, whereby the validity of the former judgment is sought to be collaterally assailed. In a suit on a forfeited recognizance an answer set up an unauthorized change in the date of the indictment, but did not state what the record disclosed as to whether such change was made without the knowledge or consent of the recognizers. And, as to that matter, this court said: "It is settled by our decisions that a record cannot be impeached collaterally, by the allegation of matters *dehors* the same, unless the complaint states what is shown by the record in relation to such matters." *Rubush v. State*, 112 Ind. 107.

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In another very similar case, *Reid v. Mitchell, supra*, a special judge had been called to try a case on a change of judge, and pending the trial he called an attorney to sit in his place, went off home out of the county, the called attorney finishing the trial, and afterwards the special judge returned and resumed the bench and rendered judgment on the verdict rendered in his absence. The unsuccessful party filed a complaint to set aside that judgment. This court there said: "Aside from these matters, however, it is very clear, as it seems to us, that in each paragraph of his complaint the appellant makes a collateral attack upon the judgment in the original cause, by alleging facts not shown by the record. If the record fails to show, as we must assume that it does, in the absence of an averment to the contrary, that Judge Robinson was absent at any time, or that A. C. Voris, Esq., presided as judge at any time during the trial of the cause, the appellant cannot procure the vacation of the judgment by alleging, as facts, the absence of Judge Robinson or the action of Voris during the trial, in contradiction of the record; if, in other words, the record of the original cause shows, as we must assume that it does, in the absence of any contrary averment that Judge Robinson alone presided at, during and throughout the entire time of the trial, and at the rendition of the judgment, then the appellant cannot collaterally attack, impeach, or contradict the record by alleging as facts that Judge Robinson was absent from the court and county, and that, while so absent, Mr. Voris presided as judge during a part of the trial of the original cause. This is precisely what the appellant has sought and is seeking to do in each paragraph of his complaint in this cause." For these reasons the complaint was held insufficient.

The allegation that none of the heirs and legatees

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were made parties to the petition to sell is not an allegation that the record discloses that they were not parties to the proceeding. The statute provides that "any person not a party to the petition may * * * be admitted as a party to the proceedings and set up any interest in or lien upon the land, and have the same heard and determined." Burns' R. S. 1894, section 2498 (R. S. 1881, 2343).

These persons may be parties to the proceeding without being parties to the petition. And, therefore, in the absence of an averment that the record shows the contrary, we are bound, by the principles above set forth, to presume that they were made parties to the proceeding, though not made parties to the petition to sell.

For these reasons the complaint did not state facts sufficient, and the court did not err in sustaining the demurrer thereto.

The judgment is affirmed.

JORDAN, J., took no part in this decision.

BOARD OF COMMISSIONERS OF THE COUNTY OF JACKSON v. BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON.

[No. 17,897. Filed October 21, 1896.]

STATUTES.—*Construction Of.—Validity of Statutes.*—The validity of an act of the general assembly will not be passed upon where the merits of the litigation may be passed upon without so doing. *p. 144.*

SAME.—*Construction Of.—Joint County Bridges.*—Section 1, Acts of 1893 (Acts 1893, p. 46; 8253, Burns' R. S. 1894) providing for the construction and repair of bridges across a stream forming the boundary line between counties, is amendatory to section 2882, R. S. 1881, and raises a conflict as to the law intended to be amended, but the provisions of the amendment by express reference to the section amended is made to depend upon same, and the provisions of the original section must be complied with before the provisions of the amendatory section can be enforced. *p. 145.*

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PLEADING.—*Complaint by One County Against Another to Recover Proportionate Costs of Constructing Bridge on Boundary Line.*—

A complaint by one county against another to recover its proportionate share of the cost of constructing a bridge upon the boundary line must show a compliance with section 2880 R. S. 1881 (3251, Burns' R. S. 1894) requiring the concurrence of the boards of commissioners of the two counties on the question of public convenience of the bridge, and that both boards considered a survey, or plans and specifications with a view to the exercise of their judgment upon the character of the bridge. *p. 176.*

From the Washington Circuit Court. *Affirmed.*

D. A. Kochenour, for appellant.

J. H. Masterson, for appellee.

HACKNEY, J.—The appellant sued to recover the alleged proportion, chargeable to the appellee, of the costs of constructing a bridge across the Muscattatuck river, at a point where said river forms the boundary line between the counties of Washington, Jackson and Scott. The complaint alleged that on the 24th day of July, 1893, the said board of commissioners of the county of Jackson, of the State of Indiana, being duly convened in special term at Brownstown, in said Jackson county, being duly petitioned by divers citizens and taxpayers of said county for the erection of a bridge across said Muscattatuck river at the point above mentioned, considered said petition, and, after hearing evidence touching the same, and being sufficiently advised in the premises, then and there made an order, which was duly entered of record, reciting therein that said board of commissioners are of opinion that public convenience requires a bridge across the Muscattatuck river at said point, and that it would be expedient to erect the same; that the willingness of the board of commissioners of Jackson county is hereby announced and declared to make and pass with the boards of commissioners of the counties of Washington and Scott a concurrent resolution and

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order to cause a survey and estimates to be made, with plans and specifications prepared by some competent person, to be presented to said boards at some specified time and place near the site of the bridge proposed to be erected, when and where such boards may meet in joint session to estimate and determine the kind of bridge which shall be erected, and the manner of paying for the same, and the part that each county shall be required to pay under the law.

Said board of commissioners of the county of Jackson, then and there, in said order, fixed Friday, the 11th day of August, 1893, at 10 o'clock a. m., as the time of meeting the boards of commissioners of the counties of Scott and Washington, at the site of the proposed bridge, in joint session, and that a certified copy of this order and proceedings be served upon the auditor of Scott county and the auditor of Washington county by the sheriff of Jackson county; that the board of commissioners of the county of Washington was duly notified of the foregoing action of the board of commissioners of the county of Jackson, as above set out; that afterwards, to-wit: on the said 11th day of August, 1893, the said boards of commissioners of Jackson, Washington and Scott counties, pursuant to the foregoing orders of the board of commissioners of the county of Jackson, and on call of the auditors of said counties, met in joint session near Blunt's Ferry, and the site of the proposed bridge; that a joint session of the boards of said three counties was then and there duly convened, organized and held. A vote was taken, by counties, on the advisability of building said proposed bridge. Scott and Washington counties voted against the erection of said bridge, and Jackson county voted for its erection; that Scott and Washington counties refused to join in the construction of said bridge, and said joint session was duly adjourned.

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The facts were further alleged as to the publication of notice for bids, the awarding of contracts, the construction of the bridge, the payment therefor by the appellant and the amount sought to be charged against the appellee.

The court sustained the appellee's demurrer to said complaint, and that ruling constitutes the basis of the only assignment of error in this court.

The following are the statutory provisions under which the appellant asserts the liability of the appellee: "Whenever public convenience shall require the erection or repair of any bridge across any stream forming the boundary line between two counties within this State, upon application therefor to the board of county commissioners of either county, such board of county commissioners may, if they think it expedient, declare their willingness to aid in the erection or repair of such bridge by resolution or order, and shall cause notice thereof to be given to the board of county commissioners of the other county interested therein. And whenever it may be ascertained that the board of county commissioners of both counties have made such order or resolution, such board of county commissioners shall, by concurrent resolution, cause a survey and estimate to be made, submitting plans and specifications therewith, by some competent person, to be presented to their respective boards of commissioners at some specified time and place at or near the site of such contemplated bridge, when such boards of county commissioners shall meet in joint session to estimate and determine the kind of bridge which shall be erected, and the manner and time when payments shall be made for the erection or repair of such bridge: *Provided*, That whenever the board of county commissioners of any county shall have notified the board of county commissioners of any county interested in the

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erection or repair of any bridge, as specified in this section, and such board of county commissioners so notified, shall fail or refuse, for the period of thirty days, to accept or to act on the same by joining in the building or repair of such bridge, then, in that event, the board of county commissioners of such county passing such order, may, if in their opinion public convenience requires the same, build or repair such bridge, under the same rules and regulations as are now or may be in force for the building and repair of bridges wholly within the county, after first having obtained the consent and permit of the land-owner in the adjoining county, whose land will be occupied by such bridge, to the building of the same." Section 3251, Burns, R. S. 1894 (2880, R. S. 1881).

"Section 1. Be it enacted by the General Assembly of the State of Indiana, That section 2 of the above entitled act, the same being section 2882 of the Revised Statutes of 1881 of the State of Indiana, be amended to read as follows: Section 2. It shall be the duty of such boards of county commissioners, in joint session, to make such appropriation for their respective counties as will make an equitable proportion to each county of the whole cost of construction or repairs of such bridge; and such appropriation shall be in proportion to the taxable property of the two or more counties, and all taxes hereafter levied for the erection, repair or purchase of any such bridge so situated shall be levied in accordance with this act; and when the requirements of the first section of this act have been complied with, and one of the counties which will be affected by the erection, repairing or purchasing of said bridge refuses to join in the construction, repairing or purchasing of such bridge, the county desiring such improvement may construct, repair or purchase such bridge, as provided in said first

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section of this act, and when the cost of such bridge or repairs does not exceed \$3,500, the county making such improvement shall be entitled to recover from the adjoining county affected by such improvement the amount that said county should have paid had she joined in the said improvement, said claim to be enforced as other claims are enforced against counties in this State; and when such claim is litigated the judgment shall include a reasonable attorney fee for the plaintiff's attorney." Section 1, Acts of 1893 (Acts 1893, p. 46; Burns' R. S. 1894, section 3253).

The constitutionality of the section quoted from the acts of 1893 is denied by the appellee in support of the ruling of the lower court. It is urged that this section violates section 10, Art. 6, of the State Constitution, which is that "The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character."

The argument is that this provision of the constitution must be construed as if it withheld from the general assembly all authority upon the subject not within the limits of that granted; that the authority given is to grant power to the boards to act within and for their respective counties and for local purposes, and that the negative implied from the constitution is against the granting of powers to be exercised without affecting interests beyond the limits of such counties respectively. The section of the act in question, it is claimed, permits the board of one county to arbitrarily judge of the interests of another county, transact business with relation to bridges, affecting such other county, and charge the latter with the cost thereof, thus exercising extra territorial powers.

It will be seen that the section of the act of 1893, above quoted, is an amendatory section, and that its

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reference to the section of the act of 1869, which it seeks to amend, as section two of said act, "being section 2882 of the Revised Statutes of 1881," raises a conflict as to the law intended to be amended. Section 2882, R. S. 1881, was section 3 of the Act of 1869. This conflict, it is urged, renders the act of 1893 void for uncertainty.

It is the generally recognized rule of the courts that the validity of an act of the general assembly will never be passed upon where the merits of the litigation may be passed upon without doing so. While we do not assert the absence of constitutional authority in the general assembly to grant to the board of one county the power to make improvements for another county or counties, and charge the latter with the same, against the judgment and consistent protest of such other county or counties, we do maintain that a construction which would lead to results so dangerous to the public welfare will be avoided if possible. It will not readily be believed that the general assembly intended to invest one minor governmental subdivision of the State with power to construct public improvements for others of such subdivisions, regardless of majorities in numbers of counties and numbers of population, regardless of the financial condition of such other subdivision and regardless of the reasonable privilege of each county to judge for itself of the wisdom of a step affecting its interests and of its ability to meet the expense of such step. If, therefore, the section of the act in question will bear a reasonable construction which will obviate the arbitrary and unreasonable power contended for by the appellant, that construction must be adopted.

It will be observed that the two statutory provisions above quoted are now parts of a system provided for the construction, by counties, of bridges over streams

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which form the boundary line between such counties. The provisions of the latter section, by express reference to the former, are made to depend upon it. By the latter section it is provided that "*when the requirements of the first section of this act have been complied with, and one of the counties which will be affected by the erection * * of such bridge, refuses to join in the construction,*" the county desiring the improvement may proceed with it, and, upon conditions named, collect a part of the cost from the county so refusing. The complaint, in this case, to withstand the appellee's demurrer, should have shown that the "requirements of the first section" had been complied with. This it did not do.

The first of the sections above quoted, as originally passed (Acts Sp. Ses. 1869, p. 27), was, in effect, that part now preceding the proviso, and, before its amendment in 1881 (Acts 1881, p. 87), no authority existed in one county to build a bridge across a boundary stream. That authority came with the amendment of 1881. *Board, etc., v. Board, etc.*, 128 Ind. 295.

The requirements of that section, as originally passed and as it now stands, where more than one county is to be charged with the costs of such bridge, are (1) that public convenience shall require the bridge; (2) that the application therefor be made to one of the boards interested; (3) that such board shall declare, by order or resolution, its willingness to aid in building the bridge; (4) that said board shall give notice thereof to the board of the other interested county; (5) that when both boards interested shall, by resolution, express such willingness, and (6) where such boards, by concurrent resolution, cause a survey to be made and plans and specifications to be prepared, to be considered at a joint meeting to be held

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to determine upon the kind of bridge to be built and how it shall be paid for. These requirements complied with, a basis exists upon which the counties unite in making the improvement.

The act of 1893, as we have seen, provides that one county may build a bridge at the joint expense of several counties "when the requirements of the first section," above pointed out, "have been complied with, and one of the counties which will be affected * * * refuses to join in the construction." This implies that when two counties, after notice, concur in the question of the public convenience of the bridge, when they incur the expense of survey, plans and specifications, when they exercise a judgment and discretion as to the character of bridge required, and as to the time and manner of meeting the expense, and when they have expressed a willingness to aid in making the improvement, neither may, by then refusing to join, defeat the improvement at such joint expense.

One county may not build a bridge at the joint expense of several counties under the same conditions that it may build such bridge at its own expense. By section 2880, *supra*, only one of several counties interested may build a bridge at its own expense in the event of the failure or refusal for thirty days of another county to join, and that is the county giving the notice. By the act of 1893, where it is sought to charge any county refusing to join, it is provided that the county desiring the improvement may proceed, without regard to the question as to which county gave the notice or which made the refusal. It is clear, therefore, that the legislature intended to provide a different rule where one county should build at its own expense from that provided where a part of the expense might be enforced against another county.

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The complaint before us fails to aver facts disclosing any concurrent action by the several boards expressing a willingness to join in the improvement, and it does not appear that the several boards considered a survey or plans and specifications with a view to the exercise of any judgment upon the character of the bridge necessary. It is apparent, therefore, that the requirements of section 2880, R. S., *supra*, were not complied with so as to permit the appellant to construct the bridge and charge the appellee with a part of the costs thereof.

The judgment of the circuit court is affirmed.

THE CLEVELAND, ETC., RAILWAY CO. v. MONEYHUN,
GUARDIAN.

[No. 17,937. Filed October 21, 1896.]

GUARDIAN AND WARD—*Action by Guardian for Injury to Ward*—*Statute Construed*.—Under the provisions of section 266, R. S. 1881 (267, R. S. 1894) the guardian of an infant who has received a personal injury as the result of a wrongful act of another, may maintain an action against the wrongdoer for the recovery of such damages as are personally sustained by his ward. *p. 152.*

APPEAL AND ERROR.—*Special Finding*.—When the special verdict of the jury or special finding of the court omits to find any fact essential to support the judgment below, the judgment cannot be sustained. *p. 152.*

NEGLIGENCE.—*When a Question for the Jury and When for the Court*.—*Special Verdict*.—When, under the facts disclosed by a special verdict, the question is presented either as to the negligence of the defendant or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of such ultimate facts, the determination thereof is within the province of the jury, and their finding will be accepted by the court as controlling; but where the facts found are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, the finding of such ultimate fact, whatever it may be, will be disregarded by the court. *p. 153.*

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155	644
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were made parties to the petition to sell is not an allegation that the record discloses that they were not parties to the proceeding. The statute provides that "any person not a party to the petition may * * * be admitted as a party to the proceedings and set up any interest in or lien upon the land, and have the same heard and determined." Burns' R. S. 1894, section 2498 (R. S. 1881, 2343).

These persons may be parties to the proceeding without being parties to the petition. And, therefore, in the absence of an averment that the record shows the contrary, we are bound, by the principles above set forth, to presume that they were made parties to the proceeding, though not made parties to the petition to sell.

For these reasons the complaint did not state facts sufficient, and the court did not err in sustaining the demurrer thereto.

The judgment is affirmed.

JORDAN, J., took no part in this decision.

BOARD OF COMMISSIONERS OF THE COUNTY OF JACKSON v. BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON.

[No. 17,897. Filed October 21, 1896.]

STATUTES.—*Construction Of.—Validity of Statutes.*—The validity of an act of the general assembly will not be passed upon where the merits of the litigation may be passed upon without so doing. *p. 144.*

SAME.—*Construction Of.—Joint County Bridges.*—Section 1, Acts of 1893 (Acts 1893, p. 46; 8253, Burns' R. S. 1894) providing for the construction and repair of bridges across a stream forming the boundary line between counties, is amendatory to section 2882, R. S. 1881, and raises a conflict as to the law intended to be amended, but the provisions of the amendment by express reference to the section amended is made to depend upon same, and the provisions of the original section must be complied with before the provisions of the amendatory section can be enforced. *p. 145.*

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PLEADING.—*Complaint by One County Against Another to Recover Proportionate Costs of Constructing Bridge on Boundary Line.*—

A complaint by one county against another to recover its proportionate share of the cost of constructing a bridge upon the boundary line must show a compliance with section 2880 R. S. 1881 (3251, Burns' R. S. 1894) requiring the concurrence of the boards of commissioners of the two counties on the question of public convenience of the bridge, and that both boards considered a survey, or plans and specifications with a view to the exercise of their judgment upon the character of the bridge. *p. 146.*

From the Washington Circuit Court. *Affirmed.*

D. A. Kochenour, for appellant.

J. H. Masterson, for appellee.

HACKNEY, J.—The appellant sued to recover the alleged proportion, chargeable to the appellee, of the costs of constructing a bridge across the Muscattatuck river, at a point where said river forms the boundary line between the counties of Washington, Jackson and Scott. The complaint alleged that on the 24th day of July, 1893, the said board of commissioners of the county of Jackson, of the State of Indiana, being duly convened in special term at Brownstown, in said Jackson county, being duly petitioned by divers citizens and taxpayers of said county for the erection of a bridge across said Muscattatuck river at the point above mentioned, considered said petition, and, after hearing evidence touching the same, and being sufficiently advised in the premises, then and there made an order, which was duly entered of record, reciting therein that said board of commissioners are of opinion that public convenience requires a bridge across the Muscattatuck river at said point, and that it would be expedient to erect the same; that the willingness of the board of commissioners of Jackson county is hereby announced and declared to make and pass with the boards of commissioners of the counties of Washington and Scott a concurrent resolution and

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with passengers who were standing, and he was unable to find a seat upon the train, and for this reason accepted standing room in the car which he entered. After detaching the car from the train, for the reason stated, appellant did not replace it by another, in order to accommodate the passengers on the train with seats. Moneyhun, after standing in the aisle of the car until the train was near the city of Warsaw, Indiana, became sick; what made him sick, however, is not disclosed by the verdict. Believing that he would be compelled to vomit by reason of nausea, and in order to avoid soiling the car and persons standing near him, he voluntarily left the car, in which he was riding, and passed out through the door of the vestibule, and went down on the lower step of the steps leading from the ground to the car, and stood upon this lower step for a short time holding to the railing. While so standing upon this step his back was towards the platform of the car and his head was leaning forward and outward. The train, at the time he left the car and while he was standing upon said step, was running at a speed of twenty-five miles per hour; and while so standing he was thrown off the train by reason of the engineer suddenly, unnecessarily, and without warning applying steam, which caused the car to give a sudden jerk.

By being thrown from the train in the manner stated, Moneyhun was severely injured, being the same injury complained of by appellee. The jury also find that there was ample room in the car where he was, for him to ride, without going upon the platform or steps, and had he remained upon the inside of the coach in which he was riding he would not have been injured. That it was not safe, but dangerous, for him to leave the car and "go onto and stand upon the car step" as he did, while the train was running at the rate

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of twenty-five miles an hour. The jury further found that "it was not safe for a person to stand where he did, even if the train ran smooth and did not jerk."

The cars were so vestibuled as to render it safe for a passenger to pass from one car to another, and on the car door there was a printed notice, forbidding passengers to ride upon the platform of the car, but owing to the door being at the time swung back, it was thereby obscured from view. The injuries sustained by appellee's ward consisted of several fractures of both the right and left leg and dislocation of his left ankle. These injuries are found to be permanent.

The inquiries arising under the above facts embraced in the special verdict are those which usually arise under the issues in actions based upon negligence. First. Is the injury in question the result of the negligence of appellant? Second. Is the ward of appellee chargeable with contributory negligence? At the very threshold of these questions counsel for appellant challenge the right of the guardian to maintain this action, upon the ground that it could be brought only in the name of the infant by his next friend under sections 256 and 257, Burns' R. S. 1894. Section 27 of the Code of 1881, section 267, R. S. 1894 (266, R. S. 1881), provides that: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

In the case of *Louisville, etc., R. W. Co. v. Goodykoontz, Gdn.*, 119 Ind. 111, this court, on page 113, interpreted this section as follows: "If a minor under guardian-

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ship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of the ward, precisely as the latter might have recovered through the intervention of a *prochein ami*, in case he had not been under guardianship. This is so whether the ward's father or mother be living or not. The pain and suffering endured, and the permanent injury resulting from the wounding, or maiming of a minor, are personal to himself, and damages for such pain and injuries are always recoverable for his benefit."

We yield adherence to the above interpretation of the statute, and are of the opinion that it clearly authorizes a guardian of an infant, who has received a personal injury as the result of a wrongful act of omission or commission by another, to sue and recover from the wrongdoer such damages as are personally sustained by his ward. The contention of appellant upon this proposition must therefore be denied, and the action of the appellee in instituting this suit as the guardian of the injured minor is sustained.

The special verdict does not find that the ward of appellee was without fault, or free from contributory negligence upon his part at the time the injury occurred. As the freedom from fault or negligence at the time of the accident upon the part of the latter is an essential factor which must exist in order to entitle the appellee to recover in this action, we may, therefore, assume, without deciding, that appellant, under the circumstances, is chargeable with actionable negligence, and address our inquiry first to the question of contributory negligence, which counsel for appellant so strenuously insist, under the facts, must be imputed to appellee's ward. It is conceded by appellee, that under the facts his ward must be deemed to have been, at the time he sustained the injury, capable

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of being guilty of contributory negligence. The absence of contributory negligence upon the part of the injured party, at the time he received his injuries, was in issue as well as the alleged negligence of the appellant, and the burden rested upon the appellee to establish *inter alia* both of these requisite facts before he would be entitled to a recovery. The rule is firmly settled that if the special verdict of the jury, or a special finding of the court, omits to find any fact essential to support the judgment below, the latter can not be sustained. No presumptions or intendments are available in favor of a special verdict, and the omission to find a fact in favor of the party upon whom the *onus* of proving it is cast, is equivalent to finding such fact against him. As a legal rule, that which is not proven is the same as that which does not exist. See *Housworth v. Bloomhuff*, 54 Ind. 487; *Buchanan v. Milligan*, 108 Ind. 433; *Town of Albion v. Hetrick*, 90 Ind. 545; *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433; *Noblesville, etc., Co. v. Loehr*, 124 Ind. 79; *Mitchell v. Brawley*, 140 Ind. 216; 2d Elliott's Gen. Pract., section 933.

It is also a well settled proposition in this State, that whenever, under the facts disclosed by a special verdict, the question is presented, either as to the negligence of the defendant, or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of said ultimate facts, one in favor and the other against, then the determination of such fact is within the province of the jurors, and their finding will be accepted by the court as controlling. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Rush v. Coal Bluff Mining Co.*, 131 Ind. 135; *Woolery, Admr., v. Louisville, etc., R. W. Co.*, 107 Ind. 381;

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Smith v. Wabash R. R. Co., 141 Ind. 92; *Louisville, etc., R. W. Co. v. Costello*, 9 Ind. App. 462; *City of Bloomington v. Rogers*, 13 Ind. App. 121.

But if the facts found are such that the court can adjudge as a matter of law, that the injured party was, or was not, guilty of contributory negligence, then the finding of such ultimate fact, whatever it may be will be disregarded by the court. *Smith v. Wabash R. R. Co.*, *supra*.

In the case at bar, however, there is but one reasonable inference to be deduced from the facts relative to the acts of appellee's ward at the time he sustained his injuries, and that is to the effect that his own negligence contributed to said injuries, hence a finding by the jury that he was free from fault could not have affected the legal result. It is manifest, we think, from the facts shown, that the ward of appellee was thereunder chargeable with contributory negligence. While it is true that it was a duty incumbent upon the railroad company to furnish a seat within its car for each passenger taken aboard of its train, and not merely standing room in the aisle of the car, the mere fact, however, that he was compelled to accept standing room would not justify him to voluntarily leave a place of safety and go to one of peril. The jury found that there was ample room in the car in which he was riding and in other cars upon the train, and that there was no necessity for him to go upon the platform or car steps, and that had he remained inside of the car he would not have sustained the injuries which he did. That it was unsafe and dangerous for him to leave the car when the train was running at the rate of twenty-five miles per hour and stand upon the steps, as he was doing when the accident happened. The jury further found that the place where Moneyhun stood when injured was not a safe place to stand, "even if

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the train ran smooth and did not jerk." He was not content to stop on the platform, but went upon the lower step, "and stood there with his back towards the platform and his head leaning outward," as it is expressly shown by the verdict. We are of the opinion that the facts disclose a clear and undoubted case of contributory negligence upon the part of appellee's ward, which cannot be controverted from any legal standpoint. While it may be said in the sense of decency, that it was proper for this boy, when admonished of the fact that he was about to vomit, to make an effort to avoid befouling his fellow-passengers, but even under this view, the law would not justify him in exposing himself to peril, or excuse or mitigate his negligence when he seeks redress in an action for injuries sustained. The authorities cited by the learned counsel for appellee are, under the facts, distinguishable from the case at bar and lend but little, if any, support to his contention upon the question involved.

The conclusion reached is in harmony with and supported by the following authorities: *Goodwin v. Boston, etc., R. R. Co.*, 84 Me. 203, s. c. 24 Atl. 816; *Worthington v. Central Vt. R. R. Co.*, 64 Vt. 107, s. c. 23 Atl. 590, 15 L. R. A. 325; *Camden, etc., R. R. Co. v. Hoosey*, 99 Pa. St. 492; *Fisher v. West Virginia, etc., R. R. Co.*, 39 W. Va. 366, s. c. 19 S. E. 578, 23 L. R. A. 758; *Alabama, etc., R. R. Co. v. Hawk*, 72 Ala. 112; *Jackson v. Crilly*, 16 Col. 103, s. c. 26 Pac. 331; *Patterson v. Central, etc., R. R. Co.*, 85 Ga. 653, 11 S. E. 872; *Bemiss v. New Orleans, etc., R. R. Co. (La.)*, 18 South. 711; *Wendell v. New York, etc., R. R. Co.*, 91 N. Y. 420; *Hayes v. Norcross*, 162 Mass. 546 s. c. 39 N. E. 282; *Wallace v. New York, etc., R. R. Co.*, 165 Mass. 236, s. c. 42 N. E. 1125; *Krenzer v. Pittsburgh, etc., R. W. Co. (Ind. Sup.)*, 43 N. E. 649; *Lewis v. Baltimore, etc., R. R. Co.*, 38 Md. 588; *Shirk v. Wabash*

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R. R. Co., 14 Ind. App. 126; *Reynolds v. New York, etc.*, *R. R. Co.*, 58 N. Y. 248; *Lofdahl v. Minneapolis, etc.*, *R. W. Co.*, 88 Wis. 421, s. c. 60 N. W. 795; *Butler v. Pittsburgh, etc.*, *R. W. Co.*, 139 Pa. St. 195, s. c. 21 Atl. 500; *Ecliff v. Wabash R. R. Co.*, 64 Mich. 196, s. c. 31 N. W. 180; Patterson Ry. Acc. Law, section 272; *Cincinnati, etc., R. W. Co. v. McClain* (Ind. Sup.), 44 N. E. 306; *St. Louis, etc., R. W. Co. v. Rice* (Tex.), 29 S. W. 525; *Scheiber v. Chicago, etc., R. R. Co.* 61 Minn. 499, 63 N. W. 1034; *Chicago, etc., R. R. Co. v. Carroll*, 5 Bradw. (Ill. App.) 201; *Toledo, etc., R. R. Co. v. Wingate*, 143 Ind. 125.

It follows that the court erred in denying the appellant's motion for judgment in its favor on the special verdict. The judgment is, therefore, reversed and the cause remanded, with instructions to the lower court to sustain this motion and render judgment upon the special verdict in favor of appellant.

DAVENPORT MILLS COMPANY v. CHAMBERS.

[No. 17,846. Filed October 22, 1896.]

JUSTICE OF THE PEACE.—Jurisdiction.—Unless the record of a judgment rendered by a justice of the peace shows affirmatively that jurisdiction was acquired, the same is void.

PARTNERSHIP.—Judgment.—Confession Of.—A partner has no authority to confess judgment against his partners, and if judgment be entered upon such confession, it will be void as to them, but valid as to him.

SAME.—Where partners are sued and one partner files an affidavit confessing judgment, signed by the firm name, but which purports to be and is his affidavit, the judgment is void as to the partnership.

PRACTICE.—Waiver.—When a demurrer to the answer is sustained and an amended answer is filed, error is waived as to sustaining of demurrer.

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From the Clay Circuit Court. *Affirmed.*

W. B. Schwartz, for appellant.

Rawley & Hutchison, for appellee.

MONKS, J.—Appellee brought this action against appellant, to enjoin the collection of a judgment against appellee, rendered by a justice of the peace, for the reason that the same was void.

Appellant demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was overruled. Appellant answered in two paragraphs, to the second of which a demurrer was sustained, and thereupon appellant filed an amended answer in two paragraphs, to the second of which a demurrer was sustained. A trial of the cause by the court resulted in a finding and judgment in favor of appellee.

The errors assigned are:

1. The court erred in overruling the demurrer to the complaint.
2. The court erred in sustaining the demurrer to the second paragraph of the answer.

It appears from the entry of said judgment, made by said justice, which is copied into and made a part of the complaint, that on October 17, 1894, appellant, by attorney, filed a complaint against Charles Hipplehouser and appellee, partners, upon account, that thereupon Charles Hipplehouser filed the following:

“Davenport Milling Co. v. Charles Hipplehouser and William Chambers, constituting the firm name of Hipplehouser & Chambers. Comes now Charles Hipplehouser, a partner of the aforesaid firm of Hipplehouser & Chambers, and swears that the aforesaid firm justly owes the above named plaintiff (\$231.75) two hundred and thirty-one dollars and seventy-five

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cents, the grounds of this action, and that he does not confess judgment therefor to defraud his creditors.

HIPPLEHOUSER & CHAMBERS,
Approved by Charles Hipplehouser."

That upon the same day Charles Hipplehouser appeared and made oath that said writing was true. Thereupon the justice of the peace rendered judgment upon said confession against Hipplehouser & Chambers for two hundred and thirty-one and 75-100 dollars and costs. The record of said judgment does not show that any summons was ever issued or served in said cause, or that any appearance was ever entered to said actions, except as set forth.

After setting out a copy of said judgment, it is alleged: "That at the time the complaint in said cause was filed and judgment rendered, said Hipplehouser and appellee were partners, doing business as bakers and confectioners under the name of Hipplehouser & Chambers; that appellee was never served with summons, or in any other manner notified of the commencement or pendency of said action, and never appeared therein, either in person or by attorney, and knew nothing of said action until long after said judgment had been rendered, and that he never authorized any one to confess judgment or file any papers for him in said cause, and that said justice had no jurisdiction over the person of appellee; that a transcript of said judgment was afterwards filed and recorded in the office of the clerk of the Clay Circuit Court, and an execution was issued thereon by the clerk of said court and delivered to the sheriff of said county; that appellant is the owner in fee-simple of the following real estate in said county (describing it), and that said judgment and execution constitute a cloud upon appellee's title thereto. Wherefore appellee demands that said judgment be declared void," etc.

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It is settled law in this State that unless the record of a judgment rendered by a justice of the peace shows affirmatively that jurisdiction was acquired, the same is void. *Newman v. Manning*, 89 Ind. 422; *Wilkinson v. Moore*, 79 Ind. 397; *Nicholson v. Stephens*, 47 Ind. 185; *Smith v. Clausmeier*, 136 Ind. 105; *Penrose v. McKinzie*, 116 Ind. 35; *Johnson v. Ramsay*, 91 Ind. 189.

The record of the judgment shows that the same was not confessed by the firm. It is a well settled doctrine that a partner, by virtue of his general power to act as agent of the firm, has no authority to confess a judgment against his partners, and if judgment be entered upon such confession, it will be void as to them, but valid as to him. *Hopper v. Lucas*, 86 Ind. 43; *Bitzer v. Shunk*, 1 Watts & S. 340, 37 Am. Dec. 469; *Elliott v. Holbrook*, 33 Ala. 659; *Crane v. French*, 1 Wend. 311; *York Bank's Appeal*, 36 Pa. St. 458; *Soper v. Fry*, 37 Mich. 236.

The judgment would have been void, therefore, even if Hipplehouser had confessed judgment against himself and appellee. He did not, however, confess judgment against the firm, but against himself. The affidavit is filed by him, and although signed by the firm name, purports to be and is his affidavit, and not the affidavit of appellee.

It follows that the judgment rendered against appellee was void, and the court did not err in overruling the demurrer to the complaint.

After the court below sustained the demurrer to the second paragraph of answer, appellant filed an amended answer in two paragraphs, thereby waiving the second error assigned. Elliott's App. Proced., section 683, and cases cited. The action of the court in sustaining the demurrer to the second paragraph of

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the amended answer is not called in question by any error assigned.

Judgment affirmed.

PATTERSON ET AL. v. BROWNING.

[No. 17,974. Filed October 23, 1896.]

DESCENT AND DISTRIBUTION.—*From Childless Second Wife to Adopted Child.—Forced Heirship.—Statutes Construed.*—An adopted child under the provisions of section 825, R. S. 1881 (837, Burns' R. S. 1894) is entitled to inherit the same as a natural child in lands descending at the death of the adopting father to a childless second wife, which, under section 2487, R. S. 1881 (2644, Burns' R. S. 1894) at the death of such childless second wife descends to his children.

SAME.—*Adopted Child.—Forced Heirship.—Second Adoption.*—An adopted child of the deceased husband did not lose her right under section 2487, R. S. 1881 (2644, Burns' R. S. 1894) as forced heir of the second wife to the realty which descended to such wife at the death of her husband without children by her, by the child's subsequent adoption by the man whom the widow married.

From the Vanderburgh Superior Court. *Affirmed.*

J. B. Rucker, for appellants.

W. H. Gudgel, for appellee.

MCCABE, J.—After filing a cross-complaint by the appellee, the appellants dismissed their complaint. The superior court overruled a demurrer to the cross-complaint and sustained a demurrer to the appellants' answer to such cross-complaint, and appellants refusing to plead further or amend, the court rendered judgment of partition of the real estate described in the cross-complaint, situate in Vanderburgh county, between the appellants and appellee.

The only question presented is upon the rulings on demurrer.

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It appears from the cross-complaint and answer thereto that, on February 2, 1882, appellants' father, James C. Inwood, married Mrs. Mary E. Kahn, a widow; that appellants, Nettie, Ella, Arthur and Anna, are the children of said Inwood by a former marriage. On August 22, 1882, said James C. Inwood, in due form of law, adopted Bessie Moffet as his child, and her name was changed to Bessie Inwood. On January 6, 1884, James C. Inwood died intestate, seized in fee-simple of the real estate in controversy, and other real estate and personal property accumulated during the life of his first wife, the mother of the appellants. He died without issue by his then wife, Mary E. Inwood, leaving her his surviving widow, she being his second wife and childless, and leaving appellants, his natural children and his adopted child, Bessie Inwood, the appellee, whose name was afterwards changed to Bessie Browning, all surviving him. On January 16, 1885, Robert P. Hooker, administrator of the estate of said James C. Inwood, deceased, petitioned the proper court for partition of the real estate of said decedent, so as to make assets out of the two-thirds thereof to pay the debts of said decedent. And in that proceeding the real estate in controversy was set off to such surviving widow as the one-third of the whole in fee-simple. Under this decree she took possession of the same, and held it until her death, on August 15, 1895. On August 25, 1885, said widow married William A. Browning. On May 24, 1888, Bessie Inwood was adopted by him and her name changed to Bessie Browning.

Upon this state of facts the appellants claim that the real estate in controversy descended to them as the forced heirs of said widow to the exclusion of all others, and especially to the exclusion of the appellee.

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It will be seen that at the date of the death of James C. Inwood, January 6, 1884, that the amendment to section 2487, R. S. 1881, had not been adopted. Burns' R. S. 1894, section 2644. Therefore, it is conceded on both sides that the fee-simple descended to the widow, Mary E. Inwood, and that at her death it descended from her to her husband's children. The point of contention is whether the appellee, the adopted child, was a child within the meaning of the statute already referred to. The appellants contend that she was not, and the appellee contends that she was.

The language of the proviso to the section is as follows: "*Provided*, That if a man marry a second or subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children." R. S. 1881, section 2487.

The pertinent part of the other statute involved provides that "from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother." Burns' R. S. 1894, section 837 (R. S. 1881, 825).

Construing the last statute above quoted along with the proviso in the other quoted above as amended in 1889 (Burns' R. S. 1894, section 2644), the language of which as to the point now in question is substantially the same as the original, this court held in *Markover v. Krauss*, 132 Ind. 294, 17 L. R. A. 806, that an adopted child, under the provisions of the section, inherit the same as a natural child. To the same effect is *Barnhizer et ux. v. Farrell*, 47 Ind. 335. The conclusion here

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reached is not inconsistent with *Keith v. Ault*, 144 Ind. 626, as that decision is founded on a different statute.

The other reason suggested why the appellee could not inherit as the adopted child of James C. Inwood, suggested by appellants' learned counsel, namely, that she was afterwards adopted by William A. Browning, is not supported by any reason or authority, nor have we been able to find any. We see no reason why an adopted child may not inherit from its natural parents, and also from its adopted parents. And if that is so, and we think it is, there is equally no reason why such adopted child might not inherit from both the first and second adopted parents. At all events, there is no reason why the second adoption should destroy the relation created by the first adoption and the legal capacity to inherit thereby created.

Therefore, the superior court did not err in overruling the demurrer to the cross-complaint and in sustaining the demurrer to the answer of the cross-complaint.

The judgment is affirmed.

DISSENTING OPINION.

JORDAN, J.—I cannot yield my concurrence to the result reached by the majority of the court. I am of the opinion that section 2487, R. S. 1881, of the Statute of Descent, cannot be, in reason, construed so as to hold that a child adopted alone by the wife's deceased husband, is her forced heir within the meaning of that section. Or, in other words, that such adopted child cannot be held to be a child by a previous wife, by whom it was not adopted, such being the facts in this case.

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GOODWIN ET AL. v. THE BOARD OF COMMISSIONERS
OF WARREN COUNTY.

[No. 18,080. Filed October 28, 1896.]

FREE GRAVEL ROADS.—*Proceedings for Additional Assessment.—County a Proper Party Plaintiff.*—The county has such interests in the proceedings under sections 6860, *et seq.*, Burns' R. S. 1894, for the reassessment of lands benefited by and for the cost of constructing a free gravel road in excess of the estimated cost, as will entitle the board of county commissioners to be made a party plaintiff, although the county cannot ultimately be required to bear any part of the cost of such road.

SAME.—*Construction Of.—Reassessment by County Commissioners.*—The board of commissioners of a county has the power to cause a reassessment against the lands benefited, to cover such additional cost of construction as may be found to exceed the original estimate.

SAME.—*Additional Assessment of Benefits.—Defenses.*—In proceedings for a reassessment to cover additional costs of construction of a free gravel road there is no question open except the validity and amount of the additional assessment.

SAME.—*Construction Not in Compliance with Contract.—Remedy.*—If a free gravel road when completed is not up to the standard contracted for, the remedy is upon the contractor's bond.

From the Warren Circuit Court. *Affirmed.*

W. P. Rhodes, for appellants.

C. V. McAdams, for appellee.

HACKNEY, J.—This proceeding originated before the board of commissioners of Warren county, and involved questions relating to the reassessment, under section 6860, *et seq.*, Burns' R. S. 1894, of lands benefited by and for the cost of the construction of a free gravel road.

In 1892, in proceedings, the validity of which is not only unquestioned, but is expressly affirmed by the

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appellants, the appellee ordered the construction of a free gravel road, the estimated benefits of which were stated at \$29,780.00, and the estimated cost of which was stated at \$17,602.58. To meet the cost of constructing said road, the bonds of the county were executed and sold in the sum of \$19,000.00 and interest. After the completion of the road, and in 1894, it was ascertained that the cost of said road was \$6,928.10 in excess of said estimated cost. In December, 1894, the appellee, having discovered that the original committee appointed to assess the benefits to the lands affected and to apportion the cost of construction, had failed to make such assessment of the benefits, appointed a committee to make such assessment of benefits and apportion the same in proportion as the several tracts affected were benefited, and to apportion against the several tracts of real estate, in proportion to such benefits, the said sum of \$6,928.10, so that the sums originally apportioned to the several tracts and the sums added would not exceed the benefits to the tracts severally. The committee so appointed filed its report in compliance with the order of the board so appointing, and the board caused notice to be given to the land-owners of the filing of such report and assessment. The appellants appeared before the board in response to said notice and filed exceptions to the report of the committee. The first exception recites the original proceeding, the report of the committee failing to assess benefits to the lands of the several appellants, the issuing of the bonds, the contract for the work and its completion. It further recited the action resulting in the report of the last appointed committee. It is alleged, also, "that said sum of \$17,602.58 was duly assessed against the lands along the line of said road and liable to pay the expense of constructing said road." But "they object and except

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to such assessment of benefits, and also to the assessment made against their lands by the report of said committee for the reason that said board had no right or power to appoint said committee, nor had said committee any power or authority to assess the benefits to their lands nor to apportion or assess any part of said \$6,928.10 or any sum against their said lands.”

The second exception is upon the ground that the road is not properly constructed and is of no benefit to their lands, although they express their willingness to pay all of the \$17,602.58 charged against their lands.

The third exception states the conclusion that the appointment, action and report of the last committee were *res adjudicatae* and void.

The board overruled these exceptions and the exceptors appealed.

In the circuit court the case was entitled *John T. Nixon et al. v. Abner Goodwin et al.*, the former being the petitioners for the road and of the latter some were petitioners and others were not, but all were exceptors. Pending said appeal, the board of commissioners of Warren county, appellee herein, appeared and, on motion, was admitted as a party plaintiff, and the cause was re-docketed in the name of said board as plaintiff and these appellants as defendants. The court sustained appellee's motion to strike out said exceptions, and sustained also its motion to dismiss the appeal.

It does not affirmatively appear that the petitioners were, as parties, excluded from the case, and, while we have no doubt of the proposition urged by appellants' learned counsel, that the county could not ultimately be required to bear the cost, or any part of the cost, of the road, yet the interests of these appellants could not suffer by admitting the board. It has been

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repeatedly affirmed that the board is the agency through which the lands benefited by a free gravel road are made to bear their proportion of the cost of constructing the road. In addition to this, the very fact that the county should not incur a liability which the lands do not discharge suggests the duty of the board to protect the interests of the county. The proceeding was essentially one to reimburse the county and to save it in the expenditures which were found to exceed the estimated cost. Though possibly not a necessary party, we have no doubt it had such nominal interests as entitled it to be made a party.

The case of *Jamieson v. Board, etc.*, 56 Ind. 466, for the establishment of a highway, and the case of *Murphy v. Board, etc.*, 73 Ind. 483, an application for a license to sell liquors, both held that on appeal, the board was not a proper party. In either case the board was as a court, and without interest in the controversy. Here the board simply calls into action the authority created by law, the committee, whose duty it is to make the reassessment for the protection and reimbursement of the county.

By the letter and the form of the exceptions, and by express declaration of counsel for the appellants, in his brief, no question is made touching the legality of any of the proceedings prior to the attempted reassessment. It is conceded that this court has held, under the statute, *supra*, that power exists in the board to cause a reassessment, against the lands benefited, to cover such additional cost of construction as might be found to exceed the original estimate. This concession is supported by the following cases. *Board, etc., v. Fullen*, 111 Ind. 410; *Gavin v. Board, etc.*, 104 Ind. 201; *Board, etc., v. Fahlor*, 114 Ind. 176; *Tucker, Treas., v. Sellers*, 130 Ind. 514; *Manor v. Board*,

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etc., 137 Ind. 367; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681; *Abbett v. Board, etc.*, 124 Ind. 467.

It is insisted, however, that this holding is erroneous, because under it the amount of the lien upon the lands affected cannot be known and the right to convey and mortgage is impaired. The holding is well settled and, in our opinion, is sound. The assessments are justified upon the theory that the property is benefited; the county board is but the public agency through which the rights of the parties are secured and the corresponding burdens are enforced, and the statute in every provision plainly protects the county from the burdens of the improvement. If an error or oversight has caused the cost of the improvement to be underestimated, there is no reason for holding that the contractor or the county should bear the burden of the excess, when the entire cost is only beneficial to the landowners. The proper cost justly measures the benefits to and the liability of the landowners, and no reason exists for a claim that they should not, when it is properly ascertained, contribute severally the proportion of such cost as the same is measured by the benefits found. This liability is known, though its exact limits are not ascertained, from the first assessment, and it is presumed, as to mortgagees or grantees, that they receive in added improvement a value equal to the added burden, and they are not wronged. With the concession that only the reassessment is in question, and the power to make it having been established, it remains to inquire whether it was properly made, so far as the exceptions filed were concerned.

That the matter of the assessments of benefits is finally adjudicated by the first assessment is a contradiction of all of the cases we have cited and of the statute, which authorizes a reassessment when the

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first assessment has proven insufficient. Nor does the power to reassess deprive the landowner of the constitutional right to be heard, since the practice requires that he be notified of the assessment, and that he be permitted to file exceptions and be heard upon them. This implies, however, that such hearing shall be upon some question involved in the action proposed by the assessing power.

As said in *Tucker, Treas., v. Sellers, supra*, "There was no question open, except the validity and amount of the additional assessment." Under the exceptions filed neither of these questions was made. The reassessment proceedings could involve no question not pertinent if made against the original assessment, and that assessment is made before the construction of the road. Therefore, no question as to the manner in which the road is constructed is competent. If the road, when completed, is not up to the standard contracted for, the remedy is upon the contractor's bond, and it is not in denying the right of the county to be reimbursed for the expended cost of construction.

It is apparent that no question made by the exceptions was admissible, and that the circuit court did not err in striking out those filed and, for the want of proper exceptions, in dismissing the appeal.

The judgment is affirmed.

ASHCRAFT ET AL. v. KNOBLOCK.

[No. 17,775. Filed November 5, 1896.]

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TRESPASS.—*Joint Action.*—*Joint Recovery.*—A plaintiff who sues several persons as joint trespassers has no right to any other than a joint recovery where the form of the issue is not modified by a severance of the answers. *p. 173.*

SAME.—*Joint-Tort-Feasors.*—*Separate Judgments.*—*Plaintiff has but One Execution.*—Where a plaintiff has obtained several judg-

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ments for joint trespass, he can have but one execution, and such execution, or order for it, discharges all others. *p. 175.*

From the St. Joseph Circuit Court. *Affirmed.*

Baker & Miller, and F. J. L. Meyer, for appellants.

Andrew Anderson, for appellee.

HACKNEY, J.—This was a suit by the appellee, Knoblock, against the appellants, Ashcraft and Ward, to enjoin the enforcement of an execution, from the Elkhart Circuit Court, in favor of Ashcraft, and held by Ward as the sheriff of St. Joseph county. The amended complaint was drawn upon the theory that the judgment upon which such execution had issued had been rendered in an action of trespass against Knoblock, Weaver and Hogan jointly, in which they had defended jointly, and in which the damages had been awarded and judgment rendered for one sum against Knoblock, and for another sum against Weaver and Hogan, upon a finding that such three defendants were guilty of a joint trespass and, further, that Weaver and Hogan had paid the judgment so rendered against them, thereby compensating for the joint trespass, and, in legal effect, discharging the entire liability, including that against Knoblock.

To the amended complaint a demurrer of the appellants for the want of sufficient facts was overruled, and the appellants answered in two paragraphs, the first being a general denial, and the second, setting up the pleadings in the action for trespass, including a complaint, an answer in two paragraphs and a reply in denial; also the instructions of the court, the verdict of the jury and certain facts seeking to show that the trespass was upon separate pieces of property; that the alleged trespassers had, upon the trial, severed in their defense; that the court had tried the

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case by the admission of evidence and its instructions to the jury, upon the theory that it embraced several trespasses defended separately and by the defendants severally. Facts were pleaded also to the effect that the defendants had not, by motion or other means, objected or excepted to the severance of the damages by the instructions of the court, the verdict of the jury and the judgment rendered. The appellee replied in denial of the answer, and upon a trial a decree was rendered in favor of the appellee, enjoining the enforcement of said execution, and the appellant Ashcraft was directed to cause the judgment against the appellee to be receipted as satisfied.

Two errors are assigned in this court, the action of the court in overruling the demurrer to the complaint and the overruling of a motion for a new trial.

The pleadings in the action for trespass, as set out in the answer in this case, showed an action against Knoblock, Hogan and Weaver jointly, charging them with breaking and entering the Reynolds House, a hotel occupied by Sarah A. Ashcraft, and in ejecting her from said hotel, by removing her furniture and fixtures therefrom and in breaking and injuring certain of such furniture; that said hotel consisted of Nos. 114 and 116 South Michigan street, in the city of South Bend, and which No. 114, it was alleged Mrs. Ashcraft held as Knoblock's tenant. The answer was joint as to all of the defendants to said action, and the second paragraph denied the tenancy of Mrs. Ashcraft, and justified the entry of No. 114 and the removal of the furniture and fixtures therefrom under a writ of restitution, in the hands of Hogan, as constable, and Weaver, as his deputy, issued upon a judgment in favor of Knoblock and against Chauncey E. Ashcraft, husband of the appellant. The acts alleged to have constituted the trespass, it was averred, were

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committed on the 17th, 18th and 19th days of March, 1892, without severance, as to parties, with reference to the two numbers, and the answer did not seek to distinguish, as to time, between those acts affecting the furniture in No. 114 and that in No. 116. In our opinion there was no possibility, upon the pleadings in that case, of regarding the action or the defense as separate with reference to parties, time or property.

Upon the trial of this case the court admitted evidence tending to show that in the trespass case the court had admitted evidence and had instructed the jury upon the theory that the trespass was upon different pieces of property, at different times, and that Knoblock was not a participant, so far as the trespass upon No. 116 was concerned. But, it is manifest from the result of the trial in this case that the court was not controlled by such evidence.

Counsel for the appellant say: "We admit that where a suit is against several joint wrongdoers as to one wrong, the judgment must be for a single sum assessed against all of the parties found responsible, and further, that the principle of severance does not apply to the award of damages, and no apportionment of damages can be made, although all of the defendants may not be equally culpable, and we are aware of the fact that hundreds of decisions can be found in support of this doctrine, but we insist that no case can be found where distinct and separate trespasses are committed by different defendants at different times, that damages cannot be assessed against the defendants separately and the amount of the plaintiff's damages apportioned." Besides the concession in this statement, appellants' counsel do not controvert the proposition of the appellee that the payment by one of several joint-tort-feasors of all, or such portion of the damages as will discharge him who makes the pay-

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ment, will work the discharge from liability of all who may have been so jointly liable.

One question, therefore, and the most important question in this case, is as to whether the payment of the several judgments against Weaver and Hogan was the payment of a joint liability as to the three trespassers. This question turns principally upon the inquiry as to whether separate judgments were authorized. Upon the pleadings, as we have seen, they were not authorized. The theory of a case must be determined from the pleadings. *Bremmerman v. Jennings*, 101 Ind. 253; *Hasselman v. Carroll*, 102 Ind. 153; *Brown v. Will*, 103 Ind. 71; *Armacost, Admr., v. Lindley, Admr.*, 116 Ind. 295; *Shirk v. Mitchell*, 137 Ind. 185; *Terre Haute, etc., R. R. Co. v. McCorkle*, 140 Ind. 613.

Whatever may be the rule as to several recoveries, where the issue presents several liabilities, it cannot be admissible to present the issue of a joint liability against a number and to recover against them severally. This does not, of course, deny the statutory rule that where a number are sued a recovery may be had against one or against some jointly, when others may be found not guilty. *Everroad v. Gabbert*, 83 Ind. 489.

But the appellant, having presented the issue that Knoblock, Hogan and Weaver, by joint trespass, had become liable to her in damages, and that form of the issue not having been changed or modified by a severance in the answers, she had no right to any other than a joint recovery, unless her action had failed as to some two of the defendants.

It cannot be that upon a joint issue as to a single trespass the questions may be tried as to numerous trespasses by the defendants severally. If such inquiries could be made the office of the pleadings would fail, and one injured by several trespasses, committed at various times, by persons having no con-

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nection therein, could unite such trespasses in one suit, as for one trespass, and they, defending that alleged trespass jointly, could be severally mulct for the trespasses by them so severally committed. Surely no such procedure could be tolerated under our code. It is quite enough to say that if several are sued, some may be acquitted and a judgment rendered against the one or more found guilty, unless, possibly, the principle of severance is authorized by some pleading on behalf of the defendants. In this case it is clear that the issue raised by the pleadings was joint as to parties and related to an alleged single trespass. But the appellants' learned counsel urge that they were permitted to prove separate trespasses, one of which Knoblock was guilty and one of which Hogan and Weaver were guilty, and that, therefore, no different verdict and judgment were possible. If this were true it would not prove that the appellants' unauthorized procedure should place her in a better situation than if her recovery had been authorized by the issues. See *Cooley on Torts*, p. 136; 2 *Hilliard on Torts*, 267; *Everroad v. Gabbert*, *supra*; *Prichard v. Campbell*, 5 Ind. 494; *Carney v. Reed*, 11 Ind. 417.

At most, it can only be said that in a suit against joint-tort-feasors the plaintiff obtained several judgments, and that having done so she then received from some of such joint-tort-feasors the full satisfaction of their liability.

It is the settled law that there can be but one satisfaction from joint-tort-feasors. *Blann v. Crocheron*, 20 Ala. 320; *Fields v. Law*, 2 Root (Conn.) 320; *Snyder v. Croy*, 2 Johns. 227; *Gunther v. Lee*, 45 Md. 60, s. c. 24 Am. Rep. 504; *Breslin v. Peck*, 38 Hun. 623; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Thomas v. Rumsey*, 6 Johns. 26; *Mitchell v. Allen*, 25 Hun. 543, 26 Am. and Eng. Ency. of Law, pp. 682,

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683, and notes; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

The rule sustained by the holdings in this and other states is, that having obtained several judgments for joint trespass the plaintiff can have but one execution, and such execution, or an order for it, discharges all others. *Allen v. Wheatley*, 3 Blackf. 332; *Davis v. Scott*, 1 Blackf. 169; *Fitzgerald v. Smith*, 1 Ind. 310; *Prichard v. Campbell*, *supra*; *Snodgrass v. Hunt*, 15 Ind. 274; *Fleming v. McDonald*, *supra*; *Everroad v. Gabbert*, *supra*.

In the last cited case the following is quoted with approval: "If, however, a jury should return a joint verdict of guilty against more than one defendant, and assess several damages, it is not such an irregularity as will necessarily avoid the verdict; it is optional with the plaintiff to have a *venire de novo*, or to cure the irregularity by entering a *nolle prosequi* against all but one of the defendants, whom he may elect to charge with the damages assessed by the jury against that defendant." See *Layman v. Hendrix*, 1 Ala. 212; *Halsey v. Woodruff*, 9 Pick. 555; *Beal v. Finch*, 11 N. Y. 128; *Fleming v. McDonald*, *supra*; *Prichard v. Campbell*, *supra*.

It will be seen, therefore, that it was for the appellant to take some action to avoid the severance of the damages, and that having failed to do so, and having accepted payment from Hogan and Weaver, she elected to waive the liability of Knoblock. She could not thereafter enforce, by execution, the judgment against Knoblock. The question here is not whether injunction may issue to restrain the irregular judgment, but it is as to whether the enforcement of a judgment which, in legal contemplation, has been satisfied can be enjoined. Of course it can.

One question suggested by appellants' learned coun-

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sel is, that the St. Joseph Circuit Court has no jurisdiction to restrain the process of the Elkhart Circuit Court. The jurisdiction here exercised is in enjoining the officer of St. Joseph county and a citizen of St. Joseph county from enforcing against a citizen of St. Joseph county a judgment debt which has been satisfied. That this may be done is not in doubt.

In our opinion there is no available error in the record, and the judgment of the circuit court is affirmed.

HOWARD, J., did not participate in the decision of this case.

 BIG FOUR BUILDING AND LOAN ASSOCIATION
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[No. 17,849. Filed November 5, 1896.]

APPEAL.—*Assignment of Errors.*—*Parties.*—The assignment of errors is appellant's complaint in the Supreme Court, and the only parties over whom it acquires jurisdiction are those named therein.

SAME.—*When Dismissed.*—An appeal will be dismissed if the assignment of errors does not contain the full names of all the parties.

From the Marion Superior Court. *Dismissed.*

Beckett & Doan, for appellant.

Geo. Carter, for appellees.

MONKS, C. J.—This action was brought by appellant against Charles A. Olcott and six others. From the judgment of the court below appellant appeals. In the assignment of errors the parties are thus designated: "*Big Four Building and Loan Association v. Charles A. Olcott et al.*" The sixth rule of this court requires that "The assignment of errors shall contain the full names of all the parties." Appellant has not complied with this rule. The assignment of errors is

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149	607
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his complaint in this court, and the only parties over whom it acquires jurisdictions are those named therein. Section 655, Thornton's Indiana Prac. Code, note 1. *Bozeman v. Cale*, 139 Ind. 187, 190, and cases cited; Elliott's App. Proced., section 186, 322.

The parties to the judgment appealed from not being before this court, the cause is not in a condition to be determined upon its merits. *Gourley v. Embree*, 137 Ind. 82; *State, ex rel., v. East*, 88 Ind. 602.

The appeal is therefore dismissed.

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[No. 17,965. Filed November 5, 1896.]

COLLATERAL ATTACK.—*Judgment by Default.*—*Quieting Title.*—An order setting aside a default can not be collaterally attacked in a subsequent action to quiet title. *p. 180.*

JUDGMENT.—*Setting Aside Default.*—Where a judgment has been taken by default, and upon application of the defendant the default is set aside and the judgment opened up that it may be set aside, if the defense shall prove good, such judgment is preserved as a lien pending the litigation, but is abrogated upon the entering of a decree for defendant, even though the decree does not in express terms annul the original judgment. *p. 181.*

PLEADING.—*Infant.*—*Plea in Bar.*—*Plea in Abatement.*—*Decree.*—Where, in a suit to foreclose a mortgage the defendant sets up the fact of his infancy at the time the note and mortgage was executed, such answer, by whatever name it may have been inadvertently called, is a plea in bar and not in abatement, and the addition to the decree for the defendant of the words: "and that the same do abate" is but surplusage and may be disregarded. *p. 185.*

INFANT.—*Right of Action During Minority.*—*Statute Construed.*—An infant may bring an action to set aside a default and judgment against him before he attains his majority, as the statutory provision giving infants two years after becoming of age to bring suit for cause of action accrued during minority does not prevent the bringing of actions before becoming of age. *p. 186.*

From the Elkhart Circuit Court. *Affirmed.*

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H. C. Dodge, for appellants.

O. M. Conley, for appellee.

HOWARD, J.—This was an action brought by appellee to quiet his title to certain real estate. The appellants answered the complaint by general denial, and also filed their cross-complaint, asking that their title to the same land be quieted. An answer in general denial was filed to the cross-complaint.

The case being submitted for trial, there was a finding in favor of the appellee, with judgment quieting his title. On a new trial, granted as of right under the statute, the finding and judgment were again for the appellee.

On the last trial the facts were found specially by the court, and the correctness of the conclusions of law on the facts so found is submitted for decision on this appeal.

The court found: (1) That the title to the land in dispute was, on the 5th day of April, 1890, in one James N. Dygart, from whom both parties trace title; (2) that, on April 16, 1890, the said Dygart, being at the time a minor, mortgaged said real estate to the appellants, to secure a promissory note for \$250.00, executed to them on that day; (3) that, on the 8th day of December, 1890, suit was brought by appellants to foreclose the mortgage; summons was served upon Dygart, but he did not appear, and judgment of foreclosure was taken against him on default; on January 17, 1891, the land was sold to appellants on order of sale, and a sheriff's certificate was issued to them; no redemption has been had from said sale; (4) that at the ensuing term of court, on March 17, 1891, the said Dygart, being still a minor, by his complaint, moved to set aside the default and judgment taken against him on December 8, 1890; appellants appeared and

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filed their demurrer to Dygart's said complaint, and also filed counter-affidavits; afterwards, on July 14, 1892, Dygart arrived at the age of twenty-one years; at the October term, 1892, on October 10, 1892, the action to set aside the default was, by order of court, stricken from the docket; but, thereafter, at the same term, on November 9, 1892, on motion of Dygart, said action was reinstated, and he filed an amended complaint, or petition, supported by affidavits, to set aside the default and vacate the judgment; and, at the same term, on November 17, 1892, all the parties being present, the court entered the following decree:

"Come now the parties, and the court now upon due consideration now orders that the default heretofore made herein be, and the same is now, set aside, and the judgment opened [but] not set aside, and the defendant is allowed to make defense herein." Thereafter, at the December term, 1892, on December 19, 1892, Dygart, in compliance with the order so made, filed his answer to appellants' complaint for foreclosure, in two paragraphs, and on December 22, 1892, he moved for judgment on his answer; and the court, on hearing the evidence, appellants' attorney being present, entered the following decree:

"Comes the defendant, James N. Dygart, and by counsel moves for judgment on the answer; plaintiffs being three times called come not, but therein make default; the cause being at issue on the answer of said defendant in abatement is submitted to the court for trial thereon, and being well advised in the premises the court, on the facts adduced, finds for the defendant on said issue; it is therefore considered, ordered and adjudged by the court that the plaintiffs recover nothing by this action and that the same do abate." Thereafter the appellants, appearing specially, asked leave to have said last mentioned judgment and de-

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cree stricken out, which motion was overruled. From said decree no appeal has ever been taken; and the same is still in full force and effect.

Further findings show that appellants received a deed from the sheriff upon their certificate of sale, which deed has never been annulled, except as in the foregoing order and decree; that James N. Dygart, after becoming of age, made his deed for the land to the remote grantor of appellee, in which deed he disaffirmed all contracts, deeds and mortgages executed by him before arriving at full age; and that appellee is in peaceable possession of said property, claiming title to be the same under his deed in fee-simple through *mesne* conveyances from said Dygart. The conclusions of law were in favor of appellee, and a decree was entered confirming his title to the land.

The questions discussed by counsel on this appeal have relation to the force and effect of the order setting aside the default and the succeeding decree in favor of James N. Dygart, as both are set out in the special findings.

“Appellate Courts,” as said in Elliott’s General Practice, section 1032, “are much more reluctant to interfere where a default is set aside than in cases where the application is denied as evidenced by many decisions. The rule is analogous to that which prevails where new trials are granted, for, as is well known, appellate courts very seldom interfere with an order granting a new trial.” Here we do not inquire whether the default was rightly set aside. The default, in fact was set aside, and the order setting it aside cannot be attacked collaterally. The contention of counsel for appellants, that as the order first made did not vacate the judgment of foreclosure taken against Dygart, but only opened up that judgment, set aside the default, and permitted Dygart to make his

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defense, and as the final decree did not, in terms, annul the judgment, the same still remains in force, notwithstanding the decree in favor of Dygart on his answer filed in the original action; in other words, that although the court permitted Dygart to answer, and made its findings and decree in his favor on such answer, yet that the judgment, which had been opened for no other object than that this defense might be made, closed at once against him as soon as his defense was successful, and so as to defeat the sole purpose for which it had been opened.

We cannot think this contention tenable. "The last judgment," as said in Van Fleet, Coll. Attack, section 862, "is always conclusive that no cause existed why it should not be rendered." It may be conceded that the last judgment in this case should have formally set aside the first; but even if this be so the error is but an irregularity. The first judgment having been opened up that it might be set aside if the defense should prove good, and that defense having been sustained and a judgment thereon entered, the first judgment is in effect abrogated. At most, the first judgment would be but an opened-up judgment with all proceedings thereunder stayed, and it could be no basis to sustain any action. Its life was suspended, and has never been restored. It is *functus officio*, and another judgment has taken its place.

It has been held, too, that the setting aside of a decree, when the order should have been that it be merely opened up to allow a party to defend, although an irregularity, yet does not render the action of the court void. Van Fleet, Coll. Attack, section 660, citing *South'n Bank St. Louis v. Humphreys*, 47 Ill. 227. It is also clear that when a judgment is opened the plaintiff is put to his proof as if no judgment had ever been entered. 12 Am. and Eng. Ency. of Law, 138. The only

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difference between setting aside a decree, and opening it up in order to let a party in to defend, is that in the former case the decree is at once annulled, while in the latter it is permitted to stand with all the proceedings thereunder stayed, until the court may determine whether the defense is good or not. If the defense fails the judgment is confirmed; if the defense succeeds a new judgment takes the place of the original.

In making the order setting aside the default and permitting Dygart to come in and defend, the court seems to have been guided by the ruling in *Pierson v. Holman*, 5 Blackf. 482, and *Wiley v. Pratt*, 23 Ind. 628. In the latter case it was said: "Where the party was within the reach of the process of the court, although not served with notice, and an appearance has been entered for him by an attorney, the court may well require him to aver in his proceedings, to obtain relief from the judgment, that he has a defense to the action, and if no rights of *bona fide* purchasers have intervened, the court will stay proceedings under the judgment, while it preserves its lien, and permit the party to make his defense to the original action, and, to the extent he may succeed in that defense, relieve him from the effect of the judgment."

In the case before us, Dygart was served with process and judgment taken against him on default. The court finds that the defendant was a minor at the date of giving the note and mortgage sued on. He had, therefore, a good defense to that action, the defense of infancy. As the court granted his prayer to set aside the default and permit him to make his defense, we must presume that it was found that he had averred, "in his proceedings to obtain relief from the judgment, that he had a defense to the action," the defense of infancy. Following, however, the spirit of

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the precedents in the cases which we have cited, the court did not, in that order, set aside the judgment, but preserved its lien, while, at the same time, the defendant was let in to make his defense.

The finding and judgment, as shown in the special findings, were: "The cause being at issue on the answer of said defendant in abatement, is submitted to the court for trial thereon, and being well advised in the premises the court, on the facts adduced, finds for the defendant on said issue. It is therefore considered, ordered and adjudged by the court that the plaintiffs recover nothing by this action, and that the same do abate." No appeal was ever taken from this decree.

There was evidently some confusion of ideas in the making up, or in the entry of the decree so made. A plea in abatement is a dilatory plea, and not a plea to the merits. If interposed in defense, it is a tacit admission that a right of action is shown in the complaint, but sets up matter which tends to defeat or suspend the action, "but which does not debar the plaintiff from recommencing at some other time or in some other way." *Needham v. Wright*, 140 Ind. 190; 1 Enc. Pl. and Pr. 1.

It is true that infancy may be pleaded either in abatement or in bar, depending on the facts shown. In case the facts pleaded show, or do not deny a good cause of action, but merely disclose that the party is a minor and therefore cannot maintain or defend the action, then the plea, if made, would be in abatement. Doubtless, however, the court, in such case, would appoint a guardian *ad litem* for a minor defendant, and the trial would proceed; and even if judgment should be entered without such appointment, the error would be but an irregularity, and the judgment, if not attacked on its merits, would stand. *Cohce v. Baer*, 134

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Ind. 375. In case, however, the facts should show that the party against whom the action is brought was a minor at the time of executing the note or other obligation sued on, then, it is plain, that no cause of action would be shown against him. The minor having been incapable of entering into the alleged contract, there would, in fact, be no contract; and the answer setting up such a state of facts would be a plea in bar, and not in abatement.

In the case before us, the findings do not set out the answer filed by Dygart. It is simply stated that "said James N. Dygart filed answer in said original cause in two paragraphs." As, however, there was a finding for Dygart and a decree entered in his favor on such answer, we must presume that the court found the answer sufficient, that it was such as the law required in the case. But in a proceeding to vacate a judgment the answer must be to the merits, and not merely in abatement. *Bristor v. Galvin*, 62 Ind. 352. As said in Elliott's General Practice, section 1032, "A meritorious defense must be shown by the party who seeks relief from the default. * * * The defense must be one of a substantial nature affecting the merits of the case." The only such defense shown in the findings was, that Dygart had executed the note and mortgage sued on while he was an infant. There was therefore no cause of action against him; and the answer setting up such facts, by whatever name it may have been inadvertently called, was a plea in bar and not in abatement. Unless as to necessities, infancy is a complete defense in such an action. *Zerger v. Flattery*, 83 Ind. 399; *Miller v. Hart*, 135 Ind. 201.

The form of the finding, as showing the answer to have been one in abatement, is irregular, but in substance it is sufficient. The facts found show the an-

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swer to have been in bar. The essential matter, moreover, is the decree. That reads: "It is therefore considered, ordered and adjudged by the court that the plaintiffs recover nothing by this action." That is a complete judgment against the appellants in the original action in foreclosure, and sweeps away not only the judgment which had been opened up to allow a rehearing, but also the sheriff's sale, certificate and deed which had been based upon the judgment. The addition to the decree of the words, "and that the same do abate," is but surplusage, and may be disregarded.

"In some cases," it is said in 12 Am. and Eng. Ency. of Law (1st ed.), 122, citing numerous authorities, "the judgment entered is so clearly not the judgment which the law would have pronounced on the facts established by the record, that the court will presume a clerical misprision and amend the entry." In the case before us, the findings show that a defense in bar was established, while the decree erroneously made use of words which might indicate a judgment in abatement. There is, however, sufficient to show that the decree, while irregular in form, was, in substance, one in bar. This decree, besides, has never been appealed from or set aside, but is still in full force and effect, the court, also, having expressly refused to strike it out. Whether the decree would be held good on appeal we need not say; what we decide is that it cannot be overthrown on this collateral attack.

Neither do we think that error is shown by reason of the fact that Dygart brought this action to set aside the default and judgment before attaining the age of twenty-one years. He brought his action at the term next after that at which the judgment had been entered. He was then a minor, although the decision on his petition was not rendered until after he was of full

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age. The petition to set aside a default, moreover, is not the foundation of a new action, but a continuation of the original action. Besides, while it is true that under section 297, Burns' R. S. 1894 (296, R. S. 1881), infants have two years after becoming of age to bring suit for cause of action accruing during their minority, *Lehman v. Scott*, 113 Ind. 76; yet this statute does not prevent a minor from bringing his action before he becomes of age, as well as within the two years after he arrives at age. *Edwards v. Beall*, 75 Ind. 401.

The judgment is affirmed.

FISH v. BLASSER ET UX.

[No. 17,774. Filed November 6, 1896.]

EJECTMENT.—Improvements.—Tax Title.—An invalid tax deed constitutes a colorable title under the provisions of section 1093, Burns' R. S. 1894, which will entitle the holder to recover in ejectment for improvements made by him upon the land.

APPEAL.—Objections not Raised Below.—The objection that an occupying claimant exercised his right to recover, for improvements, under a cross-complaint in the main action can not be first made on appeal.

LIMITATION OF ACTION.—Taxes and Improvements Paid by One Occupying under Tax Deed.—The right of action of an occupying claimant to recover for taxes paid and improvements made upon land, accrues when he is adjudged not to be the rightful owner thereof, and a recovery of the premises awarded to the plaintiff.

From the Pulaski Circuit Court. *Affirmed.*

Borders & Borders, for appellant.

Steis & Hathaway, for appellee.

JORDAN, J.—Appellant prosecuted this action in the lower court to recover possession of certain described real estate and to quiet title. Appellee filed an answer and cross-complaint. By the latter he set up and sought to recover, as an occupying claimant

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under the code, taxes paid and the value of permanent improvements made by him upon the land in dispute, subsequent to its purchase. A trial resulted in favor of the appellant upon his complaint, and in favor of the appellee upon the matters set up in his cross-complaint. Counsel for appellant insist upon two alleged errors, which are predicated upon the court's conclusion of law upon the special finding of facts, and upon its action in overruling the motion to modify the judgment. An outline of the material facts, as found by the court, are substantially as follows:

On March 2, 1878, the auditor of Pulaski county, wherein the land in controversy is situated, executed to one Sedgwick a tax deed "in due form" for said real estate upon a previous sale of the same to him for delinquent taxes. On October 15, 1883, Sedgwick and wife executed a quit-claim deed for the same land to the appellee. Both of these deeds were properly recorded. At the time appellee acquired his claim to the land it was not under fence, and was "uncultivated, unimproved," and covered by water during the greater portion of the year. After receiving his deed from Sedgwick, appellee took possession thereunder in 1884, and each year he would harvest the grass which grew wild thereon, and while occupying it under color of title, he paid the taxes and made permanent and valuable improvements, such as fencing, grading, and ditching said land, and was still in possession at the commencement of this action. On July 11, 1895, the appellant obtained a deed to the land from Lyle E. Ripley, and before the commencement of this action, demanded possession of appellee.

The court found, as a conclusion of law, that appellee obtained no title to the land through the deed from Sedgwick; but that such conveyance was sufficient to, and did give him color of title, and that he was en-

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titled to recover for taxes paid and improvements made, under the provisions of the law relative to occupying claimants. Appellant insists that the tax deed to Sedgwick did not give color of title sufficient to entitle appellee to recover the taxes paid and the value of permanent improvements. Section 1093, Burns' R. S. 1894 (1080, R. S. 1881), of the statute, applicable to the rights of an occupant of land under color of title, provides as follows: "The purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning of this act, whether such person or officer had sufficient authority to sell or not, unless the want of authority was known to the purchaser at the time of the sale; and the rights of the purchaser shall pass to his assignees or representatives." There is nothing in the finding of facts tending to show that Sedgwick, through whom appellee claimed title, at the time he purchased the land at the sale for delinquent tax, had any knowledge of the absence of authority for the sale of the land in satisfaction of such tax, or that he was not a purchaser in good faith.

Bad faith is the opposite of good faith; it is a species of fraud, and therefore is never presumed, but must be proven by the party who asserts that it exists in a particular instance. It follows, as a necessary sequence under the facts, when applied to the above section of the statute, that appellee had a colorable title to the realty in controversy, and under it, having made the permanent improvements in question, we must presume that they were made in good faith, until the contrary is made to appear. *Hilgenberg v. Northup*, 134 Ind. 92. Consequently, when it was judicially found that he was not the rightful owner of the land, he was entitled to avail himself, under the law, of the rights of an occupying claimant.

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It is further contended by appellant that appellee ought not to recover in this action as such claimant for the reason that he exercised his right so to do under a cross-complaint in the main action. It is a sufficient answer to this contention to say that this procedure was not questioned in the court below, and appellant cannot be heard to complain of it for the first time in this court.

The next insistence is that appellee's right to recover was barred by the limitation statute of fifteen years, applicable to the foreclosure of a lien for taxes. But he did not seek a foreclosure of any such lien. His right to proceed under the act relative to occupying claimants accrued when he was found, as in this action, not to be the rightful owner of the land, and its recovery awarded to the appellant. Section 1087, Burns' R. S. 1894 (1074, R. S. 1881); *Westerfield v. Williams*, 59 Ind. 221.

Appellant filed a motion requesting the court to modify its judgment so as to award a recovery only for taxes paid by the appellee, and not for the value of the improvements. Under the facts in the case, the court did not err in denying this motion.

There being no available error in the record, the judgment is affirmed.

CENTRAL UNION TELEPHONE COMPANY v. FEHRING.

[No. 17,864. Filed November 6, 1896.]

TELEGRAPH AND TELEPHONE COMPANIES.—*Common Carrier.—Constitutional Law.*—The act of April 8, 1885 (sections 5511, 5512 and 5529, Burns' R. S. 1894) prescribing the duties of telegraph and telephone companies and providing penalties for its violation, is not unconstitutional as embracing the two subjects, telegraph and telephone companies, as its subject is that of regulating a certain class of common carriers. *p. 191,*

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160	519

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161	288
161	347

146	189
167	72

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TELEPHONE COMPANIES.—*Discrimination Between Patrons.—Statute Construed.*—Refusal of a telephone company to connect the instrument of a subscriber with that of another patron renders it liable to the penalty imposed by the Act of April 8, 1885, requiring every telephone company to supply all applicants with telephone connections and facilities without discrimination or partiality, as the duty, under the statute, does not cease upon furnishing the instrument and connecting it with the exchange. *p. 192.*

VENIRE DE NOVO.—*When Not Granted.*—A *venire de novo* need not be granted because the verdict in an action for a statutory penalty upon two alleged violations of the statute assesses the damages at the amount of a single penalty as if it is a finding upon but one paragraph of the complaint, without noticing the other; it is equivalent to a finding against the plaintiff upon the other. *p. 193.*

APPEAL.—*General Verdict.—Presumptions.*—All reasonable presumptions and intendments must be made to sustain a general verdict. *p. 193.*

From the Bartholomew Circuit Court. *Affirmed.*

Marshall Hacker and Charles F. Remy, for appellant.

Geo. W. Cooper and C. B. Cooper, for appellee.

MONKS, C. J.—This action was brought by appellee, against appellant, to recover the statutory penalty under section 5529, Burns' R. S. 1894 (section 2, p. 151, Acts 1885), for failure and refusal on the part of appellant to supply appellee with "telephone connection and facilities without discrimination or partiality."

The complaint was in two paragraphs, which were substantially the same, except the offense was alleged on different days. Appellant's separate demurrer for want of facts to each paragraph of complaint was overruled. An answer in three paragraphs was filed, to which a reply of general denial was filed. The cause was tried by jury, and a general verdict rendered in favor of appellee, and his damages assessed at \$100.00, and over a motion for a *venire de novo*, and a motion for a new trial, judgment was rendered in favor of appellee.

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The first objection urged to the complaint is, that the act upon which the cause of action is based embraces more than one subject, telegraph companies and telephone companies, and is therefore unconstitutional, under the provisions of section 19, Art. 4, of the constitution (section 115, R. S. 1881, 115, Burns' R. S. 1894). The act in question is entitled, "An act prescribing certain duties of telegraph and telephone companies, * * * providing penalties therefor, and declaring an emergency." Acts 1885, p. 151.

This court has held that a telephone company doing a general telephone business is a common carrier of news in the sense in which a telegraph company is a common carrier, and that section 2, p. 151, Acts 1885, section 5529, *supra*, prescribes the duties of telegraph and telephone companies as such common carriers. *Central, etc., Telephone Co. v. Bradbury*, 106 Ind. 1, and cases cited; *Central, etc., Telephone Co. v. State, ex rel.*, 118 Ind. 194, 10 Am. St. Rep. 114.

The subject of the act is neither telegraph nor telephone companies, but the act prescribes the duties of such companies as common carriers. It was proper to name in the title the common carriers covered by the provisions of the act. This act, therefore, embraces but one subject, that of regulating a certain class of common carriers and matters properly connected therewith, and is not invalid for the reason urged..

It is next insisted that the complaint does not state a cause of action within the meaning of said section 2 of said act, section 5529, *supra*.

The allegations show, among other things, that appellant, at the time stated, owned and operated a general system of telephone lines in the city of Columbus, Indiana; that appellee had one of the appellant's telephones in his drug store, and desiring to converse with another patron of appellant, called upon the ex-

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change and asked to be connected with said other patron, which connection was refused by appellant. Appellant urges that the section upon which appellee predicates this action applies to discrimination between applicants for telephones, not to discrimination between patrons of a telephone company. In other words, appellant's contention is that the act requires telephone companies to furnish an instrument and connect it with its exchange, when applied for without discrimination, but when this is done, the duty of the company to such person, under the act, ceases, and that no penalty can be recovered under said act for a refusal to furnish the connection and facilities by which he can use the instrument.

We think it clear, under the provisions of the section in controversy, that telephone companies are not only required to furnish an applicant the instrument and properly connect the same with its exchange, but it is also their duty to supply all the connections and facilities necessary to the use of such instrument. The section provides that: "Every telephone company * * * shall within the local limits of such telephone company's business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality. * *" Merely furnishing an applicant with an instrument and connecting the same with the exchange is not a compliance with this statute. This alone would not enable such person to use the telephone instrument. After the telephone instrument was furnished appellee and connected with the exchange, it was the duty of appellant each time when requested by appellee to make such connection as would enable him to converse with the person named without discrimination or partiality, and for a refusal

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so to do appellant became liable to appellee as provided in said act.

The court did not err, therefore, in overruling the demurrer to each paragraph of the complaint.

Appellant contends that if the jury found for appellee on both paragraphs of the complaint, they should have assessed the damages at \$200.00, and that only having assessed the damages at \$100.00, it is evident they only found for him upon one paragraph. That the verdict did not cover all the issues, is defective, and the court therefore erred in overruling the motion for a *venire de novo*.

The jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages at \$100.00." The statute provides that any person or company violating any of the provisions of the act shall be liable to any party aggrieved in a penalty of \$100.00 for each offense.

The rule in this State is that a motion for *venire de novo* will not be sustained unless the verdict, whether general or special, is so defective and uncertain upon its face that no judgment can be rendered upon it. *Bartley v. Phillips*, 114 Ind. 189, and cases cited on p. 192; *Board, etc., v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325.

A verdict, however informal, is good if the court can understand it. *Daniels v. McGinnis, Admr.*, 97 Ind. 549. The verdict in this case is not informal or defective, even if appellant's contention, that it only finds for appellee upon one paragraph is correct, for the reason that a finding in favor of appellee upon one paragraph of his complaint, without noticing the other, would be equivalent to a finding against him on such other paragraph. *Shaw v. Barnhart*, 17 Ind. 183.

The verdict in this case being general, found all the

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essential facts and issues in favor of appellee, and all reasonable presumptions and intendments must be made to sustain it. *Louisville, etc., R. R. Co. v. Summers, Admr.*, 131 Ind. 241.

If it were conceded that the jury should have assessed the damages at \$200.00, that was an error in favor of, and not against appellant, and of which only appellee could complain. What we have said disposes of the other error assigned.

Judgment affirmed.

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[No. 17,924. Filed November 6, 1896.]

PLEADING.—Action on Note and Mortgage.—Sufficiency of Answer.—

In an action on a note and to foreclose the mortgage security, an answer alleging that defendant has fully paid "all the notes and items charged and mentioned in the complaint" is sufficient to cover the obligations of both the note and the mortgage. *p. 199.*

FRAUD.—Attorney and Client.—Excessive Fees.—Where an attorney at law makes false statements to his client as to the value of land of which such client is an heir, and as to the value of attorney's fees in asserting claim against an adverse claimant, and falsely states to such client that such adverse claimant has employed all the attorneys in the town, such client being uneducated and uninformed as to the value of the land, and uninformed as to what steps had been taken in the premises by the adverse claimant, such false statements on the part of the attorney constitute fraud, available as a defense to a note given to the attorney for excessive fees. *p. 200.*

APPEAL AND ERROR.—When Rulings of the Trial Court are Correct for Reasons Other Than Counsel Presents.—The Supreme Court will not reverse the ruling of the trial court, if correct, even though counsel in support thereof should not give the correct reasons for the holding. *p. 198.*

SAME.—Longhand Manuscript of Evidence, When Filed.—Bill of Exceptions.—The longhand manuscript of the evidence must be filed with the clerk before it is incorporated in the bill of exceptions. *p. 201.*

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From the Jay Circuit Court. *Affirmed.*

Headington & LaFollette, and *P. B. Manley*, for appellant.

LaFollette & Adair, and *France & Merryman*, for appellee.

HACKNEY, J.—Suit by the appellant upon a note by the appellee for \$1,000.00, with a credit of \$522.00, and to foreclose a realty mortgage securing the same. Answer in four paragraphs: 1. No consideration. 2. That all of the balance sued for, excepting \$100.00 principal and \$10.00 attorney's fees, was promised without consideration. 3. Answering as to all but \$110.00, alleges that one Felty died intestate in Adams county, the owner of a large amount of real and personal property; that appellee was his only heir at law and entitled, by descent, to all of said property; that a Mrs. Beerbower claimed to be the lawful widow of the decedent, and had procured herself to be appointed administratrix of the estate; that she claimed the whole of said estate and denied that the appellee was an heir of the decedent; that the appellant, a practicing attorney in Adams county, was aware of the condition of said estate and the contention about the heirship and ownership thereof; that the appellee was a farmer, uneducated in business affairs generally, and unable to read or write, and had had no experience in business or in legal controversies and no knowledge of the extent or value of attorney's services, all of which was known to the appellant when he went to the appellee and told him that he was the rightful owner of all of said property; that it would require a law suit to obtain it from Mrs. Beerbower, whose sons were shrewd and experienced business men and were assisting her to maintain her claim to the property, and had employed all the lawyers in De-

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catur to represent her; that it would take a great deal of work and expense to fight the case and recover the property from her; that he could and would recover for appellee all of said property; that the attorney's fees therefor would be reasonably \$1,000.00, and that no lawyer could be employed for less. It was alleged that all of the statements by the appellant were false and were made fraudulently and for the wrongful purpose of inducing the appellee to execute a note and mortgage for \$1,000.00. It was further alleged that the appellant had falsely and fraudulently represented the value of said real estate to be \$4,000.00, when it was worth but \$2,000.00; that the appellee was unacquainted with the value of real estate in the locality of that in question, and fully relied upon the appellant's statement; that he relied upon and believed all of the appellant's statements, and in reliance thereon did execute the note and mortgage in suit; that no litigation was had, but instead the case was compromised by the appellant, Mrs. Beerbower receiving half the real estate and all of the personal, and executing her note for a difference of \$500.00, and the appellee receiving real estate of the value of \$1,000.00; that the appellant obtained and appropriated from said note \$350.00, and that the services rendered were worth but \$50.00, to which should be added \$5.00 as an attorney's fee on said amount. The fourth answer was that appellee had "fully paid said plaintiff all the notes and items charged and mentioned in the * complaint long before * suit."

The appellee filed also a cross-complaint alleging the same facts alleged in the third answer, and seeking a cancellation of the note and mortgage and the quieting of his title against the appellant.

Demurrers were overruled as to each answer and as to the cross-complaint. Issue was joined and a trial

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resulted in a finding and decree in favor of the appellant for \$141.24, and the foreclosure of the mortgage. A motion for a new trial was overruled, exceptions were reserved, and the several rulings mentioned are here assigned as error.

The sufficiency of the first answer is not questioned; that of the second is expressly conceded; that of the third involves the same questions presented as against the cross-complaint, and the fourth is objected to as not broad enough to cover the entire cause of action sued upon. The allegation: "All the notes and items charged and mentioned in the complaint" was sufficient, in our opinion, to cover the obligations of both the note and the mortgage as pleaded in the complaint and was not objectionable upon demurrer.

The sufficiency of the third answer and of the cross-complaint is attacked by counsel for the appellant as not alleging positive fraud, since, as claimed, the allegations consist in mere opinions and predictions as to the extent of service necessary, the value of lands, and the extent of resistance by Mrs. Beerbower, and since no allegation was made as to diligence on the part of the appellee to learn and act upon the truth in any of the matters in which he alleges he was deceived by the appellant. Their sufficiency is attacked also as not alleging facts constituting constructive fraud. Counsel for the appellee do not seek to uphold the ruling of the lower court upon the first proposition, that as to positive fraud. It is neither claimed that an allegation of diligence was made, nor that it was unnecessary, but it is urged that the relation of attorney and client existed and required from the appellant the utmost good faith, and permitted the appellee, without investigation, to rely upon the statements and representations of the appellant, and that the burden rested upon the appellant to prove the truth and good faith

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of his statements and representations. In other words, the contention of counsel for the appellee is, that each of the pleadings in question alleges constructive fraud in procuring the note and mortgage for an excessive sum. •

Though counsel should not give the correct reason supporting the ruling of the trial court, if it is apparent that the ruling was correct, this court will not reverse the ruling. Otherwise the value of a decision as authority would depend, not upon the allegations of the pleading upheld or condemned, nor upon the reasoning of the court in its decision, but upon the strength of the reasons given by counsel for or against the pleading.

Upon the question of diligence, it has been settled that a contracting party may rely on the express statement of an existing fact, the truth of which is unknown to him, but which is asserted by the other contracting party, as a basis for mutual agreement. *Kramer v. Williamson*, 135 Ind. 655; *Jones v. Hathaway*, 77 Ind. 14; *Union, etc., Ins. Co. v. Huyck*, 5 Ind. App. 474; *Frenzel v. Miller*, 37 Ind. 1.

Of course, this proposition must be regarded in the light of another which is equally well settled, that one may not rely upon the truth of a statement which he knows to be untrue, or which is manifestly false. It is true that, ordinarily, mere representations as to value are not sufficient to support the charge of fraud. *Shade v. Creviston*, 93 Ind. 591; *Hartman v. Flaherty*, 80 Ind. 472; *Cagney v. Cuson*, 77 Ind. 494; *Neidefer v. Chastain*, 71 Ind. 363; *Kennedy v. Richardson*, 70 Ind. 524. But, as said in 1 Bigelow on Fraud, p. 496: "The rule however that representations of value will not be considered by the courts is not universal; we have elsewhere seen that if a fiduciary or confidential relation exists between the parties, representations of value

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made by the party holding the position of trust or confidence have the same effect as ordinary representations of fact. And these probably are not the only cases in which the law will take notice of such representations. If one of the parties to a sale assumes to have special knowledge of the value of the property, in regard to which the other, being known to be ignorant, trusts entirely to the good faith of the former, to the former's knowledge, it may be very proper to treat representations of value as standing upon the same ground as representations of fact."

To the latter proposition are cited *Stover's Adm'rs v. Wood*, 26 N. J. Eq. 417; *Bradbury v. Haines*, 60 N. H. 123; *Estell v. Myers*, 54 Miss. 174; *Picard v. McCormick*, 11 Mich. 68; *Simar v. Canady*, 53 N. Y. 298; *Cruess v. Fessler*, 39 Cal. 336, and other cases. We have examined the cases cited and find that they support the text.

In *Picard v. McCormick*, *supra*, it was said: "In the case before us the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think it cannot be laid down as a matter of law that value is never a material fact; and we think the circumstances of this case illustrate the impropriety of any such rule."

In the present case, as to the services required and their value, the appellant, by reason of his profession, must be held to possess special knowledge and skill, and the appellee alleges his dense ignorance; the appellant's knowledge of that fact, his own reliance upon the appellant who designed to deceive the appellee. These allegations would bring the case within the

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rules quoted from Bigelow. We are not prepared to say, in this case, that the false representation of the value of the land, as alleged, falls within the general rule that the mere exaggerations of value, in puffing one's goods which he desires to sell, must be expected from the vendor, and cannot be relied upon by the vendee. Here a false statement is alleged with reference to the value of an estate, not for the purpose of inducing the appellee to purchase, but to excite his interest, to magnify the stake for which the litigation must be waged, to induce the impression that Mrs. Beerbower, in whose behalf all of the attorneys of Decatur had been employed, would make a vigorous defense against the claim and altogether excuse a charge of \$1,000.00, where, as alleged, the service was worth but \$50.00.

The false representation that all of the attorneys of Decatur had been employed was a representation as to an existing fact, it was not a mere prediction, nor a simple opinion, but was made as the basis of an extravagant overcharge for services.

The argument of counsel includes a discussion of the question as to whether the rule does not apply here that, where the relation of attorney and client exists it must appear that the advantage gained by the attorney was conscionable and altogether fair. If this rule applies it is apparent that the alleged false statements of the appellant not only tended to induce the exorbitant obligation of the appellee, but actually did overreach him. It is not necessary to our decision that we pass upon this question, and we only cite some of the cases which hold that the relation of attorney and client arises concurrently with the execution of the contract of employment, and requires good faith on the part of the attorney in disclosing the facts within his knowledge upon which the compensation

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may properly be measured. *White v. Whaley*, 40 Howard Pr. 353; *Ryan v. Ashton*, 42 Ia. 365. The pleadings, in our opinion, were sufficient in charging positive fraud.

Other questions are discussed upon the motion for a new trial, all depending upon the evidence, but the appellee's objection to a consideration of the evidence must prevail. It is certified by the clerk, "that on the 31st day of May, 1895, the official shorthand reporter, who took down the evidence in said cause, filed in my office his longhand transcript and manuscript thereof, and the plaintiff at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions."

In the recent case of *Carlson v. State*, 145 Ind. 650, it was said: "It is settled by the decisions of this court that the filing of the longhand evidence must be antecedent to its being incorporated into the bill of exceptions by the signature of the judge to such bill."

To the same effect are the cases of *Marvin v. Sager*, 145 Ind. 261; *Holt v. Rockhill*, 143 Ind. 530; *Smith v. State*, 145 Ind. 176; *DeHart v. Board, etc.*, 143 Ind. 363; *Beatty v. Miller*, post 231.

The most favorable construction of this record for the appellant is, that the longhand manuscript and the bill of exceptions were filed at the same time, and that the former had not been filed before it was incorporated in the bill.

The judgment of the circuit court is affirmed.

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**TERRE HAUTE AND INDIANAPOLIS RAILROAD CO.
v. BECKER, ADMINISTRATRIX.**

[No. 17,090. Filed November 10, 1896.]

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RAILROAD COMPANIES.—Duty as to Notice of Whereabouts of Work or Wild Trains.—A railroad company operating a single track road, owes no duty to its employes upon its regular trains to adopt a rule requiring notice to be given to such employes of the whereabouts of work or wild trains, in addition to a rule printed with time table of all regular trains, requiring the conductors and engine-men of all work or wild trains to keep their trains out of the way of all regular trains, and in no case to occupy the main track of the road within ten minutes of the time of any regular train. *p. 215.*

SAME.—Presumption that Employes Will Discharge Their Duty.—A railroad company has a right to presume that its servants in charge of a work train will discharge their duty as provided by a rule requiring them to keep out of the way of all regular trains, and is exempt from liability for injuries resulting from a violation of the rule by an employe when the injury is the direct or proximate cause of such violation. *p. 217.*

SAME.—Rules for Protection of Employes.—It is the duty of a railroad company to adopt and enforce suitable rules or regulations for the protection of employes, and the company is not liable for injuries resulting from the violation thereof. *p. 217.*

SPECIAL FINDINGS.—When may be Disregarded.—Special findings that are of the nature of legal conclusions can serve no purpose in a special verdict and may be disregarded. *p. 219.*

From the Cass Circuit Court. *Reversed.*

*Bayless & Guenther, McConnell & Jenkins, and
Miller, Winter & Elam, for appellant.*

D. H. Chase, and D. D. Fickle, for appellee.

JORDAN, J.—Mary A. Becker, as the administratrix of her deceased husband, Martin Becker, sued appellant to recover damages on account of its alleged wrongful act, which resulted in the death of the decedent while in the service of appellant, serving as a fireman upon one of its freight trains.

There was a special verdict returned by the jury, and upon it the court rendered judgment in favor of

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appellant upon the second paragraph of the complaint, and in favor of appellee upon the third paragraph for \$6,000.00, the sum awarded by the jury.

This latter paragraph, after setting out the character and surroundings of appellant's railroad, especially that part of it lying between Crawfordsville Junction and Rockville, and after further averring that its road was "a single track railroad," and operated by "telegraph orders" from the company's main office at the city of Terre Haute, and that the death of Martin Becker was occasioned by the train upon which he was firing, colliding with a certain train which, on the day of the fatal accident, had been, by appellant's train dispatcher, ordered to "work wild," etc., then apparently proceeds upon the theory that said accident was due to the neglect of the appellant to notify decedent and those in charge of the train upon which he was at the time at work, of the "whereabouts" of the train which had been ordered to "work wild."

The sufficiency of the paragraph upon which the special verdict is founded is assailed, but as the questions involved are better presented, under the special verdict, we may address our consideration to it, without directly passing upon the sufficiency of the paragraph in controversy. Omitting the facts found by the jury, which are not essential to the determination of the principal legal propositions at issue in this appeal, we may properly set out the remainder of the special verdict, which is as follows:

"2. That said railroad between said cities of Terre Haute and Logansport on and before said date consisted of but one main track, with switches and side tracks at intervening stations, and was a single-track railroad, having a line of telegraph along said main track from said city of Terre Haute to said city of Lo-

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gansport, and had telegraph offices at all the principal stations on said railroad, including the stations of Judson and Waveland, but had none at Dooleys, with the principal telegraph office in the city of Terre Haute, at which point the chief train dispatcher for said defendant had his headquarters and offices, and from which point said defendant controlled the movements of its trains on said railroad by orders through the use of its said lines of telegraph.

“3. That on and before said 10th day of December, 1889, the defendant was operating and running four regular trains, two of which were passenger and two were freight, daily, southbound; and four regular trains, two of which were passenger and two were freight, daily, northbound over said railroad between the said cities of Terre Haute and Logansport; the time of the departure and arrival of said trains at the different stations on said railroad were fixed by said defendant, and printed in printed time tables, and issued to all its servants engaged then and there in operating and running said trains.

“That on the backs of said time tables were printed rules, made by said defendant for the direction and government of all its servants engaged in running and operating said trains, all of which rules were in force on and before said 10th day of December, 1889.

“That by said rules of the defendant it was the duty of conductors and enginemen of all work and wild trains to keep their trains out of the way and off the time of all regular passenger and freight trains of the defendant, and in no case to occupy the main track within ten minutes of the time of any regular train.

“That said rule 61 on said time table was as follows, to-wit:

“ ‘All work and wild trains will keep out of the way and off the time of all regular passenger and freight

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trains, and in no case occupy the main track within ten minutes of the time of any regular train.'

"That by the said rules of the defendant it was the duty of conductors of all wood and work trains of defendant at the close of each day to report to the dispatching office of said defendant by telegraph the limits of the main track they intend to occupy the following day with their trains, and to never exceed the limits specified, without special telegraph or written authority. That rule 82 on said time table was as follows, to-wit: 'Conductors of all wood and work trains must, at the close of each day, report to the dispatching office by telegraph the limits of the main track they intend to occupy the following day, and must never exceed the limits specified, without special telegraph or written authority.'

"That by the said rules of the defendant, enginemen were held accountable for the speed of their trains and the due observance of signals ahead, and were equally responsible with the conductors of their trains for keeping off the time of other trains. That rule 101 on said time table was as follows, to-wit: 'The enginemen will be held accountable for the speed of the train and due observance of signals ahead, and will be equally responsible with the conductor for keeping off the time of other trains.'

"That by the rules of the defendant, telegraph orders from the dispatching office of the defendant to its conductors and enginemen were to be sent by defendant's train dispatchers personally, and said train dispatchers in giving and sending such orders in the line of duty represented the superintendent of the defendant and had authority to act and direct the conductors and enginemen of the defendant in respect to the movements of trains under their care and control. That rule 118 on said time tables was as follows, to-

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wit: 'Train dispatchers shall, themselves, send all messages involving the movements of the trains, and must not permit another person to do it for them.'

"That rule No. 119 on said time table was as follows, to-wit: 'All special orders by telegraph for the movements of trains will be numbered consecutively, commencing with No. 1 on the first day of each month, and must be sent to all trains named in the order, at the same time addressed to the conductors of the trains for which they are intended, and signed by the train dispatchers, who, in the line of their duty, represent the superintendent.' That by the said rules of the defendant all trains were to be run under the direction of the conductors, except when their directions conflicted with the defendant's rules, or involved risk or hazard, in which case the enginemen were declared to be equally responsible with the conductors.

"That rule 80 on said time table was as follows, to-wit: 'All trains must run under the direction of the conductor, except when his directions conflict with these rules, or involve risk or hazard, in which case the enginemen will be held equally responsible with the conductor. Conductors will be held responsible for the safe management of their trains, and for the proper behavior and performance of duty by their trainmen. They must not allow any person to ride in the baggage, mail or express cars, whether connected with the road or not, except those whose duties require them to be there.'

"4. That on and before the 10th day of December, 1889, the stations of defendant's railroad, going north from the station of Rockville, were situated in the following order and distance north from said Rockville, to-wit: Sand Creek, four and two-tenths miles; Judson, seven and six-tenth miles; Dooley, eleven and two-tenth miles; Waveland, fourteen and seven-tenth

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miles; that Crawfordsville Junction was twenty-nine miles and five-tenths north of said Rockville.

“5. That on and before the said 10th day of December, 1889, the main track of said defendant railroad between the stations of Crawfordsville Junction and Rockville was crooked and full of short and sharp curves, and between the stations of Waveland and Judson the said main track followed the general course and crooked windings of Little Raccoon Creek for a distance of about eight miles, and was full of short curves, where the approach of trains in either direction on said track was hidden from the view of defendant’s servants on trains coming from the opposite direction by bluffs, hills, woods and brush, and between the stations of Waveland and Dooley, and for a distance of four miles on said track, there were six or seven short and sharp curves in said track, and also a reverse curve of very short radii, with high banks of earth and trees on the side of said track, and particularly dangerous to servants of said defendant running and operating its trains of cars thereon, by reason of their inability to see trains approaching from the opposite direction on account of said curves, banks of earth, trees and brush, in time to prevent collisions and accidents to said trains and to themselves.

“6. That on and before the said 10th day of December, 1889, the plaintiff’s decedent, Martin Becker, was a servant of the defendant, and then and there employed and engaged in the service of the defendant as a fireman on defendant’s locomotive engine No. 117, which engine, on said date, and at the time of the collision, hereinafter found, was attached to and hauling one of the defendant’s regular freight trains, known as local No. 60, and northbound, and was then and there between the stations of Dooley and Waveland on the defendant’s main track, and then and there on

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time according to the time tables and rules of the defendant, and having then and there the right-of-way and track against all wood, work and wild trains of the defendant, and running then and there at a speed not exceeding twenty miles per hour, in accordance with the rules of the defendant. The said engine No. 117, upon which the plaintiff's decedent, Martin Becker, was then and there engaged in his duties as fireman aforesaid, was run into and collided with another of defendant's engines, to-wit: No. 111, which was then and there attached to and engaged in hauling a work and wild train of the defendant south-bound, and on defendant's main track, and the plaintiff's decedent, Martin Becker, was then and there, by means of said collision, crushed and injured by and between said colliding engines and their tenders, and then and thereby instantly killed. That said Martin Becker did not in any way contribute to his said injuries or death, nor did he see said colliding engine No. 111 in time to save his life, nor was he guilty of any negligence in causing or occasioning the said collision wherein he lost his life, as aforesaid, and was at the time of his death in the performance of his duties as fireman aforesaid; and the plaintiff was not guilty of any negligence, nor did she contribute in any way in causing the injuries or death of said Martin Becker, her decedent.

"7. That on said 10th day of December, 1889, the said local, or No. 60 train, was in charge of one James H. Hardesty, as conductor, and said engine No. 117, upon which said Martin Becker was fireman, was in charge of one William Widgeon, as engineman, and that both of said persons were servants of the defendant at the time said local, No. 60, train left its terminal point, to-wit: Terre Haute; and also at the time said Becker was killed.

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“That said local train left Terre Haute, northbound, at 4:00 o'clock a. m., on said date, on time, and arrived at said station at 7:55 a. m. and on time on said date, going north; that defendant had then and there at said station of Judson a telegraph office and telegraph line in order, and an operator; that said local train stopped at said station of Judson on its arrival there, and the said conductor Hardesty reported for orders to the defendant's telegrapher at said station, but received none concerning the said work or wild train or its whereabouts whatever.

“8. The said conductor Hardesty and said engine-man Widgeon and said decedent Martin Becker were ignorant of the whereabouts of said work or wild train on said 10th day of December, 1889, and previous to the time of said collision, and that said defendant had not given them, or either of them, any information or notice whatever thereof, and that they, nor either of them had any information or knowledge of the fact that said work train was on said date working wild on said main track between the stations of Crawfordsville Junction and Rockville on said date.

“9. That on said 10th day of December, 1889, the defendant's said engine No. 111, which collided with said engine No. 117, was in charge of Edward J. Tritt as engineman, and the said work or wild train to which the said engine No. 111 was attached to and engaged in hauling at the time of the collision hereinbefore found, was in charge of Frank L. Campbell as conductor, and that both of said persons were then and there servants in the service of the defendant.

“10. That on the 10th day of December, 1889, and before the collision hereinbefore found, the said Frank L. Campbell, as conductor of the defendant's work or wild train aforesaid, at Crawfordsville Junction, a

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station on said defendant's railroad, received telegraphic orders from the train dispatching office at Terre Haute, signed by the train dispatcher of said defendant, in respect to the movement of said work or wild train for said 10th day of December, 1889, wherein and whereby the said conductor was ordered and directed 'to work wild to-day between Crawfordsville Junction and Rockville,' and was so working wild with his said train at the time of said collision, and running at the rate of twenty miles per hour with his said train.

"11. That it was the duty of said conductor Campbell and engineman Tritt, on said 10th day of December, 1889, to side track the said work train of the defendant, then and there in their charge, at the said station of Waveland, and then and there await the arrival and passage at said point of said local No. 60, going north, before pulling out with the said work train going south on the main track of said defendant's railroad.

"12. That said local No. 60 was due at the station of Dooley at 8:27 a. m., and at the station of Waveland at 8:52 a. m., on said 10th day of December, 1889, and was on time at said station of Dooley; that, notwithstanding said facts and their duty in that regard, the said conductor Campbell and said engineman Tritt recklessly, carelessly, and negligently pulled out from the station of Waveland on said date with the said work train on the main track of defendant's railroad, southbound, and before the arrival of said local, or No. 60, and on the time of said local, without taking any precaution to prevent a collision with the said local No. 60, northbound, as aforesaid, and ran said engine No. 111 at a speed of twenty miles per hour and collided with the said engine No. 117 at and on the reverse curve on said main track, between said sta-

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tions of Waveland and Dooley, on said 10th day of December, 1889, at 8:40 a. m. of said day, and then and there, and thereby, by means of said collision, instantly killed the plaintiff's decedent, Martin Becker, who was then and there engaged in his duties as fireman on said engine No. 117, and not in any way at fault in respect to said collision.

"13. That the defendant, in failing to notify the decedent, Martin Becker, the conductor, Hardesty, and engineman, Widgeon, in charge respectively of said local, or No. 60, train, and engine No. 117, hauling said train, on said 10th day of December, 1889, at or before said train and engine arrived at the said station of Judson on defendant's said railroad, and before the said collision, of the whereabouts of said work train and engine No. 111, hauling the same, on said date, caused the collision aforesaid and the death of said Martin Becker, and was guilty of negligence in failing to notify said Becker, Hardesty and Widgeon of the whereabouts of said work train and engine No. 111, on said day before said collision.

"14. That it was the duty of the defendant, considering the many short curves and reverse curves on its main track, and the inability of its servants operating its trains, to see approaching trains coming from the opposite direction thereon, on account of the many short curves and reverse curves on its main track, and the bluffs, banks of earth, hills, trees and brush on the side of the main track, existing between said stations of Crawfordsville Junction and Rockville, on and before said 10th day of December, 1889, to have notified the servants of said defendant, then and there in charge of said local, or No. 60, train, and said engine No. 117 hauling the same, including the decedent, Martin Becker, of the order given by said defendant's train dispatcher to said conductor Campbell, in charge

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of said work or wild train on said 10th day of December, 1889, 'to work wild' on that day with his said train between said stations of Crawfordsville Junction and Rockville.

"15. That the defendant, for more than one year prior to the said 10th day of December, 1889, had knowledge of the many short and sharp curves and reverse curves on its main track, and of the inability of its servants to see approaching trains coming from an opposite direction on said main track on account of said curve and reverse curves, high banks of earth, hills, trees and brush on the side of said track, and existing between said stations of Crawfordsville Junction and Rockville, and of the danger to its servants operating its trains from collision with wild trains at or near reverse curves between said stations; and negligently failed to make any rule requiring its train dispatcher to notify regular train crews that wood or work trains were working wild between said stations in time to prevent collisions or accidents at or near said reverse curves, as it was in duty bound to do for the protection of its servants operating its trains between said stations."

It will be seen, among others, that the following facts are disclosed by the special verdict: that appellant's road was a single-track railroad, leading from Logansport to Terre Haute, consisting of a main track with switches and side tracks, and had a line of telegraph along its entire road; that on and before December 10, 1889, being the day on which the fatal collision occurred, the company was operating and running daily southbound over its road four regular trains—two passenger and two freight—and also a like number running north. The time of the arrival and departure of each of these trains at the respective stations along the road was fixed by the appellant and

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printed in time schedules, or time tables, and these were issued and delivered to all of its servants then engaged in operating said trains. On the inverse sides of these time tables were printed rules adopted by appellant for the direction and government of all of its servants engaged in operating trains; that under these rules conductors and enginemen of all work and wild trains were required to keep the same out of the way and off of the time of all regular passenger and freight trains, and in no case to occupy the main track of the road within ten minutes of the time of any regular train; that by these rules, the enginemen and conductors were equally responsible for keeping off of the time of other trains. On said 10th day of December appellee's decedent was in the service of appellant as a fireman on engine No. 117, which, on that day, was attached to and hauling a regular freight train known as local No. 60, which was, on said day, northbound, and at the time of the collision was running on time between the stations of Dooley and Waveland, and was entitled to the right-of-way as against all work and wild trains; that on said date, and before the accident in question, the appellant, through its train dispatcher, the latter, under the rules in giving and sending orders in the line of duty, represented the superintendent of the company, sent an order to the conductor in charge of the work train, which was being drawn by engine No. 111, to "work wild" with his train on that day between Crawfordsville Junction and Rockville. That the conductor and engineman of said work train were the servants of appellant; That local No. 60 was due at the station of Dooley at 8:27 a. m., and at Waveland at 8:52 a. m.; that it was the duty of conductor Campbell and engineman Tritt, in charge of said work train, to have side tracked their train at Waveland and there remain until the

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arrival and passage of No. 60, upon which Becker was fireman, but disregarding their duty in this respect: these servants of appellant "carelessly" and "negligently" "pulled out from the station of Waveland on and to the main track" and started south before the arrival at this station of No. 60, "and on its time," without taking any precaution to prevent a collision with No. 60, and while running between said stations of Dooley and Waveland at a speed of twenty miles per hour, said work train met and collided with the northbound local No. 60, on the reverse curve of the track, at 8:40 a. m., on said 10th day of December, and thereby killed said Martin Becker; that previous to this collision the appellant gave no notice to the deceased, nor its servants in charge of said local No. 60, of the "whereabouts" of this work train on that morning, and that neither he nor they had any knowledge that said train on that day was working wild between Crawfordsville Junction and Rockville.

The principal insistence of counsel for appellee in answer to the contention of counsel for appellant, is, that, under all the circumstances, negligence resulting in the death of the deceased servant must be imputed to the appellant for the following reasons: First. In ordering the work train to work wild between Crawfordsville Junction and Rockville, over a part of its road which they insist, under the facts, is shown to be dangerous. Second. Failure to notify Becker and the servants in charge of the train upon which he was at work, of the "whereabouts" of the wild train on the morning in question previous to the accident. Third. Failure to adopt a rule requiring notice to be given to its regular trains of the "whereabouts" of wild trains.

These facts, in connection with the negligence of the employes in charge of the work train, they con-

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tend, constitute the proximate cause of the fatal collision. It may be conceded, under certain circumstances, a railroad company would be guilty of actionable negligence in ordering a train to "work wild" in the absence of notice to its servants along its line, of the fact, in the event the injury or death of one of the latter was due to the failure in whole or in part to give such notice. But, in the case at bar, under the facts and circumstances as they are shown, we are of the opinion that it cannot be affirmed as a legal proposition, that the death of appellee's decedent was due to or resulted from any negligence of the appellant. The reasons for this conclusion, we think, are obvious. The time at which all of the regular passenger or freight trains on appellant's road, were due to arrive at and depart from each station, had been fixed and published in printed schedules or time tables, and these had been delivered to all of its servants engaged in operating its trains. It had also adopted and caused to be printed and delivered to such servants a series of rules and regulations for their guidance and control in conducting and running trains under their charge. One of these rules expressly required of and enjoined upon conductors or others of its employes in the charge of work and wild trains, the duty to keep such trains out of the way of all regular passenger and freight trains, and under no event were they to occupy the main track within ten minutes of the time of any regular train, etc. On the morning of the accident in question the jury find, in effect, that the conductor and engineman in charge of the work train which had been ordered to "work wild" disregarded, or rather neglected, to discharge their required duty in failing to side track their train at Waveland, and there remain until the arrival and departure from said station of the local freight upon

which Becker at the time was serving as fireman; that notwithstanding their duty in that respect they "recklessly," "carelessly" and negligently left said station with their train before the arrival of local No. 60, and on the time of the latter, without taking any precaution to prevent the collision whereby Becker was killed.

The conclusion that the death of appellee's decedent was wholly due to the negligence of the conductor and engineman in control of the work train, in leaving with their train the station as they did, before the arrival of No. 60, and running on its time, cannot be successfully controverted, and is the only reasonable and legitimate conclusion that can be deduced from the facts in the case. Appellee admits that the employees in charge of this work train were the fellow-servants of the deceased, hence, under a well settled rule, there can be no recovery as against appellant on account of his death, resulting as it did, under the facts, from their negligence. It clearly appears, we think, from the finding of the jury, that the death of the servant in question must be attributed solely to the negligence of his fellow-servants, and therefore precludes a recovery.

It cannot be said that ordering the train in question to "work wild," under the circumstances, was an act of negligence, and when, in this connection, we consider the rules of appellant relative to the duty required of those in the control of wild trains, the law will not authorize us in holding that in addition to these, it was also incumbent upon the company to notify Becker and the other servants in control of his train of the fact that the train in controversy was "working wild," and at what point on the road it was previous to the collision. This duty, under the facts, was not required of the appellant, and its omission to

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give notice cannot be said to render it guilty of negligence. It had the right to presume that its servants in charge of the work train would discharge their duty as provided by the rules, and would keep out of the way of all regular trains, and not run upon the time of any of the latter. Neither does it appear that if such notice had been given that the fatal accident would have been avoided. Those in charge of the local freight were not required by the rules to look out for the wild train, but the employes in charge of the latter were expressly required to keep out of the way and off of the time of the former, hence, under the circumstances, we fail to recognize what purpose, if any, the notice for which appellee contends would have served. Having adopted and promulgated these rules and time schedules, appellant, when it gave the order to "work wild," had the right to presume that they would be obeyed by its servants in control of the work train.

In *Rose v. Boston, etc., R. R. Co.*, 58 N. Y. 217, it is said: "It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employes having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent of a corporation can personally oversee, and as to which employes must be relied upon."

While it is the duty of the master, engaged in such complex business as operating a railroad, to adopt and enforce definite and suitable rules or regulations for the protection of his servants, when, however, this duty has been discharged, he is exempt from liability for injuries resulting from a violation of the rules by

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station on said defendant's railroad, received telegraphic orders from the train dispatching office at Terre Haute, signed by the train dispatcher of said defendant, in respect to the movement of said work or wild train for said 10th day of December, 1889, wherein and whereby the said conductor was ordered and directed 'to work wild to-day between Crawfordsville Junction and Rockville,' and was so working wild with his said train at the time of said collision, and running at the rate of twenty miles per hour with his said train.

"11. That it was the duty of said conductor Campbell and engineman Tritt, on said 10th day of December, 1889, to side track the said work train of the defendant, then and there in their charge, at the said station of Waveland, and then and there await the arrival and passage at said point of said local No. 60, going north, before pulling out with the said work train going south on the main track of said defendant's railroad.

"12. That said local No. 60 was due at the station of Dooley at 8:27 a. m., and at the station of Waveland at 8:52 a. m., on said 10th day of December, 1889, and was on time at said station of Dooley; that, notwithstanding said facts and their duty in that regard, the said conductor Campbell and said engineman Tritt recklessly, carelessly, and negligently pulled out from the station of Waveland on said date with the said work train on the main track of defendant's railroad, southbound, and before the arrival of said local, or No. 60, and on the time of said local, without taking any precaution to prevent a collision with the said local No. 60, northbound, as aforesaid, and ran said engine No. 111 at a speed of twenty miles per hour and collided with the said engine No. 117 at and on the reverse curve on said main track, between said sta-

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tions of Waveland and Dooley, on said 10th day of December, 1889, at 8:40 a. m. of said day, and then and there, and thereby, by means of said collision, instantly killed the plaintiff's decedent, Martin Becker, who was then and there engaged in his duties as fireman on said engine No. 117, and not in any way at fault in respect to said collision.

"13. That the defendant, in failing to notify the decedent, Martin Becker, the conductor, Hardesty, and engineman, Widgeon, in charge respectively of said local, or No. 60, train, and engine No. 117, hauling said train, on said 10th day of December, 1889, at or before said train and engine arrived at the said station of Judson on defendant's said railroad, and before the said collision, of the whereabouts of said work train and engine No. 111, hauling the same, on said date, caused the collision aforesaid and the death of said Martin Becker, and was guilty of negligence in failing to notify said Becker, Hardesty and Widgeon of the whereabouts of said work train and engine No. 111, on said day before said collision.

"14. That it was the duty of the defendant, considering the many short curves and reverse curves on its main track, and the inability of its servants operating its trains, to see approaching trains coming from the opposite direction thereon, on account of the many short curves and reverse curves on its main track, and the bluffs, banks of earth, hills, trees and brush on the side of the main track, existing between said stations of Crawfordsville Junction and Rockville, on and before said 10th day of December, 1889, to have notified the servants of said defendant, then and there in charge of said local, or No. 60, train, and said engine No. 117 hauling the same, including the decedent, Martin Becker, of the order given by said defendant's train dispatcher to said conductor Campbell, in charge

Miller *et al.* v. Burks *et al.*

From the Parke Circuit Court. *Affirmed.*

Rice & Johnston, and *A. M. Adams*, for appellants.

J. M. Johns, *S. D. Puett*, and *J. S. McFaddin*, for appellees.

HOWARD, J.—The appellees filed their petition before the board of county commissioners of Parke county for the improvement of a certain highway under the gravel road law of 1885, as amended by the Acts of 1891 and 1893, being sections 6879-6899, Burns' R. S. 1894.

Such proceedings were had before the board as resulted in the establishment of the work prayed for; and on an appeal to the circuit court the action of the county commissioners was confirmed as to the appellants.

The questions on this appeal, while going chiefly to the jurisdiction of the board and of the circuit court, are yet rather technical than substantial; the principal contention being that the original petition for the work was not signed by a majority of the resident landholders of the county whose lands were within two miles of the proposed improvement, as required by the statute. The board decided this question against appellants, and assumed jurisdiction; and the circuit court held that the appellants had not been diligent in presenting the question to the board until after the report of the viewers was made.

An examination of the transcript leads us to the conclusion that while the ruling of the court may have been somewhat technical, it was yet strictly within the requirements of the statute and the holdings of this court. The objections to the petition were not seasonably made. Section 6880, Burns' R. S. 1894 (1473, E. S.); *Forsythe v. Kreuter*, 100 Ind. 27; *Osborn*

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v. *Sutton*, 108 Ind. 443; *Robinson v. Rippey*, 111 Ind. 112; *Hobbs v. Board, etc.*, 116 Ind. 376; *Evans v. West*, 138 Ind. 621.

Appellees, however, insist that there is no question before us for decision for the reason that it does not appear from the transcript that the bill of exceptions was ever filed in the cause, as required by section 641, Burns' R. S. 1894 (629, R. S. 1881). This section of the statutes provides that "the party objecting [to the decision] must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause; if not true, the judge shall correct, sign, and cause it to be filed without delay. When so filed, it shall be a part of the record." In the present case, the bill was duly presented and signed by the judge; but there is nothing to show whether it was ever filed or not. It is not shown, therefore, that the bill of exceptions is a part of the record; and no question is presented for our decision.

This question has been frequently passed upon in recent cases by this court. *Ueker, Admx., v. Bedford, etc., Co.*, 142 Ind. 678; *Rivers v. State*, 144 Ind. 16; *Salem, etc., Co. v. Hobbs, Admr.*, 144 Ind. 146, and authorities cited in those cases.

The judgment is affirmed.

KESSLER, TRUSTEE, v. THE STATE, EX REL.

CLARK ET AL.

[No. 17,815. Filed November 12, 1896.]

SCHOOLS.—*Relocation of School Building.—Power of Township Trustee.—Statute Construed.*—Sections 5920, a, b and c, Burns' R. S. 1894, providing that the change of site and removal of school building must be done by petition to county superintendent signed by

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township trustee and a majority of the patrons of the school where the building is located, takes away the discretion hitherto exercised by township trustees under section 4444, R. S. 1881, in the matter of the removal and relocation of the site of a public school building.

SAME.—Moving School Building.—Erection of New Building on New Site.—Statute Construed.—Sections 5920, a, b and c, Burns' R. S. 1894, must be construed as applicable alike to cases where it is desired to build a new schoolhouse in a new location, as it is to the mere removal of a schoolhouse to a new location.

From the Tippecanoe Superior Court. *Affirmed.*

G. P. Haywood and C. A. Burnett, for appellant.

Davidson & Storms and C. E. Thompson, for appellees.

HOWARD, J.—This action was brought by the relators for a writ of mandate, to require the appellant school trustee to employ a teacher for and to take charge of and maintain a school in schoolhouse No. 1, located in the village of Conroe, in said township.

A demurrer to the complaint and to the alternative writ issued thereon having been overruled, the appellant filed his return to the writ in five paragraphs, the first being a general denial and the remaining paragraphs special pleas, setting out a history of the trustee's action in relation to the school in question. The court sustained demurrers to the several special paragraphs of answer, whereupon the appellant withdrew his answer in general denial and elected to stand upon the court's rulings upon the demurrers. Judgment was then entered in accordance with the prayer of the complaint, and the mandate made peremptory.

The facts as recited in the complaint do not differ essentially from those stated in the answer. If, therefore, the action of the court in overruling the demurrer to the complaint was correct, the judgment should be affirmed, otherwise it should be reversed.

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From the allegations of the complaint and alternative writ it appears, that for over fifty years prior to the beginning of this action the school in question, located in said village of Conroe, and designated as schoolhouse No. 1, had been maintained by the successive school trustees of Lauramie township as a public school therein, under authority of law and in connection with the other schools of said township. But at the beginning of the current school year of 1895-6, the said trustee, it is alleged, neglected and refused, and still neglects and refuses, to employ a teacher for said school; he has caused the seats and desks to be taken therefrom, and refuses to take care of or exercise any control over said schoolhouse, and proposes to allow the same to go to waste and fall into disuse and ruin, and has suffered the building to be occupied and detained from the township by a person who is using it as a residence.

It is further alleged, "that the relators have unanimously requested said Kessler, as such trustee, to employ a teacher for said school, but he refused, and still refuses to do so, and assigns as a reason for such refusal that one James Fickle, his immediate predecessor as such school trustee of said township, in the year 1895, after the close of the school year of 1894-5, changed and relocated the site of said schoolhouse No. 1 at another place, about three-fourths or seven-eighths of a mile distant from said schoolhouse at Conroe, and had there erected another schoolhouse; but the relators aver that no such change of site or location of said schoolhouse had been made by his predecessor, nor by any predecessor, nor had the location of said schoolhouse been in any way disturbed; that said predecessor had not at any time presented to the county school superintendent of schools a petition, pursuant to the statute, asking to change and re-estab-

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lish the site of said school building; nor was any such petition signed by said trustee or any trustee, and by a majority or any number of the patrons of said school; nor had said trustee or any trustee attempted in any respect to comply with said statute relating to the change of the location of schoolhouses.”

It is provided in our school law, section 5920, Burns' R. S. 1894 (4444, R. S. 1881), that “The trustees shall take charge of the educational affairs of their respective townships, towns and cities. They shall employ teachers; establish and locate, conveniently, a sufficient number of schools for the education of the white children therein; and build, or otherwise provide, suitable houses, furniture, apparatus, and other articles and educational appliances necessary for the thorough organization and efficient management of said schools.”

Appellant contends that, under the foregoing statute, he had full authority, as school trustee of Lauramie township, to do all the acts of which complaint is made by the appellee's relators; that, by the provisions of said statute, he was sole judge as to the employment of teachers and the location or removal of schools, subject only to appeal to the county superintendent, as provided in section 6028, Burns' R. S. 1894 (4537, R. S. 1881). *Trager, Tr., v. State, ex rel.*, 21 Ind. 317; *Knight, Tr., v. Woods*, 129 Ind. 101.

It is true that, under said statute, it was formerly held by this court that, subject to appeal to the county superintendent, the discretion of the school trustee in relation to matters specified in the statute could not be controlled, save only, perhaps, in case of a clear abuse of such discretion. *Crist v. Brownsville Tp.*, 10 Ind. 461; *Braden v. McNutt*, 114 Ind. 214.

Counsel for appellee, however, earnestly insist that the statute cited, and the decisions of this court in re-

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lation thereto, are not applicable to the facts shown in the case at bar; and that this case is governed by the act approved February 7, 1893 (Acts 1893, p. 17; sections 5920 a, b and c, Burns' R. S. 1894).

Section 1 of said act provides, "That whenever it becomes necessary for the trustee of any township in this State to change and re-establish the site of any school building and remove said building to a new site and location therefor, such trustee shall first present to the county superintendent of schools of the county in which township it is situated, a petition setting forth therein the place and particular point to which it is desired to change and relocate the site of any such building, and to remove the same thereto, together with a brief statement of the purposes and reasons for such proposed change of location of said school building, and upon such petition shall first procure an order from such county superintendent authorizing him to change the site and location of such school building and remove said building to its new site and location: *Provided*, That said petition shall be signed by said trustee and the majority of the patrons of the school where said building is located, and satisfactory proof shall be made to said county superintendent that the persons signing said petition constitute a majority of the patrons of said school."

In section 2, provision is made for notice by the trustee to the patrons of the school of his intention to present such petition to the county superintendent.

It is confessed by the demurrer to the complaint that in the attempted change and relocation of the site of school No. 1, the trustee proceeded without any regard to the provisions of the foregoing statute. Counsel argue, however, that the statute has application only to cases where it is proposed to remove the school

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building itself from one place to another in the district, and not to cases where it is desired to change the site of the school; so that, it is contended, the action of a trustee who simply wishes to erect a new school building at a place different from the location of the old one is not controlled by the statute.

This, it seems to us, would be a narrow view to take of the purpose and meaning of the act of the legislature. It is certainly a rare circumstance that it should be desired to send a house-mover to change the location of a school building. And why, in such a rare case, it should be judged necessary to have the trustee and a majority of the patrons of the school petition the county superintendent for leave to take the building from one place to another, while in the much more frequent case when it is desired to erect a new building at another place, the trustee should be allowed to proceed at his own discretion, does not seem clear.

But we do not think that the language of the act admits of any such limited interpretation. The undoubted purpose of the legislature was to take away the discretion hitherto exercised by township trustees in so important a matter as the removal and relocation of the site of a school building. The language of the act shows that the intention was to give the majority of the patrons of the school a controlling voice in the removal of their school from the place where it had once been located. The judgment of the trustee and that of the county superintendent must also be united to that of the majority of the school patrons before such removal shall be allowed. The evident purpose of the legislature was that the reasons in favor of removal should be so conclusive that all persons concerned, including a majority of those most interested, namely, the patrons of the school, should unite in

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favor of such removal before it could lawfully be carried out.

Neither the school trustee by himself, therefore, nor even the trustee and the county superintendent together, on appeal from the former to the latter, have power, without the concurrence of the majority of the patrons of the school, to change the location of a school when once fixed. The legislature saw fit to take this matter from the arbitrary control of the school officers and to restore it to those to whom it originally belonged, the people of the school district itself. For a case much like the case at bar, and decided under a statute similar to our own, see *State, ex rel., v. Marshall*, 13 Mont. 136, 32 Pac. 648.

Judgment affirmed.

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[No. 17,824. Filed November 12, 1896.]

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APPEAL.—*Informal Demurrer.*—A judgment will not be reversed on appeal on account of the informality of a demurrer which was sustained to an insufficient answer to which it was addressed.

PRACTICE.—*Court May Revise Its Ruling During Term.*—The court may, at any time during the term in which the ruling is made, revise its ruling upon a demurrer, and thereby incidentally set aside a judgment entered upon such ruling.

WILLS.—*Construction Of.—Life Estate.—Condition Subsequent.*—

Where a testator, after devising to his wife a life estate in certain lands and the remainder over to his son, conditioned that the son should provide a comfortable support for his mother as long as she should live, and that in the event he failed to do so the land at her death should be sold and the proceeds thereof divided equally among testator's children, such provision is a condition subsequent and the title to such real estate vests in the son at the death of the testator, where the testator survived the wife and no alterations were made in the will.

From the Daviess Circuit Court. *Affirmed.*

Gingrich *et al.* v. Gingrich.

Gardiner & Gardiner and *J. D. Laughlin*, for appellants.

Hefferman & Mattingly and *O'Neal & O'Neal*, for appellee.

HACKNEY, J.—The lower court sustained demurrers to a cross-complaint and an answer of the appellants, and overruled their motions to modify the judgment and for a new trial. Previously the court had overruled such demurrers, but, at the same term of the court, had set aside its judgment upon such ruling and, as above stated, sustained them. All of such rulings and the action of the court in setting aside its first judgment are assigned as errors, and the discussion includes the question as to the form of said demurrers. The demurrers were informal, but if the pleadings to which they were addressed were insufficient, that fact is not available to reverse the judgment. *Blue v. Capital Nat. Bank*, 145 Ind. 518.

It was not error for the court, at any time during the term in which the ruling upon demurrer was rendered, to revise its ruling, and incidentally to set aside the judgment entered upon such ruling. *Ryon, Rec., v. Thomas*, 104 Ind. 59; *Richardson v. Hawk*, 45 Ind. 451; *Burnside v. Ennis*, 43 Ind. 411.

All other questions in the case depend upon the construction which must be given to the last will of Christian Gingrich, the father of all of the parties to this suit. By the second item of the will he devised to his wife a life estate in forty acres of land, and the third item was as follows: "I also give and bequeath to my son, Peter, the land above and last described, willed to my wife during her life time, at her death to my son Peter, on condition that he takes care of my

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said wife, his mother, and provides for her a good and comfortable support so long as she may live, and in case he should fail to provide such comfort said land, at her death, shall be sold and the proceeds divided equally among all my children."

It was provided also, by the fifth item, that the executors should run the testator's farm "for the benefit of Peter Gingrich and Anna Gingrich," testator's wife, "until the said Peter" should become twenty-one years of age, when he should have possession of certain lands conveyed to him by the testator on the day of the execution of the will. Anna Gingrich died before the testator's death.

The position assumed by the appellants is, that Peter Gingrich did not take a vested remainder, but that he was given a contingent remainder, which should vest only upon the condition or contingency of his surviving his mother and having furnished her a comfortable support to the end of her life. The law favors the earliest possible vesting of estates, and will construe the estate given as vesting *in praesenti*, unless an intention to postpone the event is made clear. *Petro v. Cassidy*, 13 Ind. 289; *Miller v. Keegan*, 14 Ind. 502; *Davidson v. Koehler*, 76 Ind. 398; *Harris v. Carpenter*, 109 Ind. 540; *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Hutchins*, 112 Ind. 322; *Amos v. Amos*, 117 Ind. 19, 37; *Bruce v. Bissell*, 119 Ind. 525; *Heilman v. Heilman*, 129 Ind. 59; *Wright v. Charley*, 129 Ind. 257; *Borgner v. Brown*, 133 Ind. 391; *Fowler v. Duhme*, 143 Ind. 248.

In several of the cases just cited, and in *Hoover v. Hoover*, 116 Ind. 498, devises similar to that here in question, were held to create vested remainders, and that words of postponement should be construed consistently with the beginning of the enjoyment of the remainder, rather than as deferring the vesting of the

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estate, if such construction were not forbidden by the clearly apparent intention of the testator.

The words of the third item of the will, "at her death," cannot, therefore, be held, in and of themselves, to postpone the vesting of the estate in fee-simple or to convert the estate devised to Peter into a contingent remainder. That the devise was subject to a condition is plainly expressed, namely: that he should provide a comfortable support for his mother for the remainder of her life. Such conditions, however, are not regarded as precedent to the vesting of the estate, but have uniformly been accepted as conditions subsequent, the violation of which would forfeit the estate. *Petro v. Cassidy, supra*; *Boone v. Tipton*, 15 Ind. 270; *Rush v. Rush*, 40 Ind. 83; *Lindsey v. Lindsey*, 45 Ind. 552; *Hoss v. Hoss*, 140 Ind. 551.

In the latter case, it was held that where the title vests subject to a condition which becomes impossible of performance, the condition is not to be regarded as broken or the title forfeited. See cases there cited.

We find nothing in the will manifesting an intention that these rules of construction should not prevail. Indeed, the intention to give Peter the land in question, notwithstanding the condition expressed should become impossible of performance, seems to be supported by the fact that after Mrs. Gingrich died there would otherwise have been no apparent purpose to maintain the will, and the testator would have destroyed or otherwise revoked it. Another fact consistent with that intention was that Peter was the youngest child and was yet a minor, and that his father expressly charged his farm with Peter's support.

Finding no error in the record, the judgment of the circuit court is affirmed.

Beatty v. Miller.

BEATTY v. MILLER.

[No. 17,543. Filed May 26, 1896. Rehearing denied Nov. 18, 1896.]

COURT STENOGRAPHER.—Section 1, Act of March 7, 1873 (Acts 1873, p. 194) relating to the employment of shorthand reporters by parties in trial court has not been repealed.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Transcript Must Show Filing Of.*—The transcript must affirmatively show that the bill of exceptions was filed in the office of the clerk, and also the date of filing the same.

SAME.—*Longhand Manuscript of Evidence.*—*When Filed.*—The longhand manuscript of the evidence must be filed with the clerk before it is incorporated in the bill of exceptions.

PRACTICE.—*Evidence.*—*Breach of Marriage Contract.*—Where in suit for breach of marriage contract an answer is filed calling in question the good character of the plaintiff before the time of the alleged contract, it is not error to admit in evidence on the trial such answer, together with depositions taken in support thereof, even though the answer had been withdrawn before the commencement of the trial.

From the Owen Circuit Court. *Affirmed.*

George Haldorn, W. M. Franklin, and I. H. Fowler,
for appellant.

Willis Hickam, for appellee.

HOWARD, J.—This was an action for breach of promise of marriage, brought by appellant against appellee.

The jury returned a general verdict for the appellee; and also, in answer to an interrogatory, found specially that there had never been any "good faith contract of marriage" between the parties.

It is contended on this appeal that the court erred (1) in overruling the motion for a new trial, and (2) in taxing certain costs against appellant.

Appellee first urges that the bill of exceptions purporting to contain the longhand manuscript of the evi-

146	231
146	201
146	258
147	231
147	516

146	231
148	214

146	231
158	481

146	231
160	451

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dence is not in the record, and hence that no question is presented under the first assignment of error. Counsel gives as a reason for this contention that no appointment was made by the court of an official stenographer to take down the evidence, as required by statute. Sections 1470-1476, Burns' R. S. 1894 (1405-1410, R. S. 1881).

In *Smith v. State*, 145 Ind. 176, it was very clearly intimated that the sections in question in relation to the appointment and duties of an official stenographer, at least in so far as they consist of the several sections of the act of the general assembly, approved March 10, 1875 (Acts 1875, p. 137), and the amendments thereto, are all invalid. It was, however, also held, in that case, that the provisions of one of said sections, namely, section 1476, Burns' R. S. 1894 (1410, R. S. 1881), are contained in full in section 1 of the act concerning the employment of shorthand reporters, approved March 7, 1873 (Acts 1873, p. 194), which last act, though not brought into the revised statutes, is yet unrepealed, and is apparently the only law in existence authorizing the use of the original long-hand manuscript of the evidence in a trial taken down by a shorthand reporter. In the first section of the act of 1873, the course followed in the case at bar for the appointment of a shorthand reporter, seems to have been substantially the mode prescribed; namely: "Whenever, on the trial of any cause in any of the courts of this State, the parties thereto, or either of them, shall employ a shorthand reporter to make a verbatim report of the evidence in said cause, the court shall, upon such party's motion, administer to the said reporter an oath that he will make a fair and impartial report of all the evidence in said cause." The remainder of said section is identical with the provisions of section 1476 (1410), *supra*.

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It does not appear, however, that the provisions of the statute as to the filing of said bill of exceptions or of the longhand manuscript of the evidence were complied with in this case. In the first place, there is no "entry or recital in the transcript at the proper place," showing the filing of the bill of exceptions, as prescribed in *Wagoner v. Wilson*, 108 Ind. 210, at p. 215; and repeated in *Miller, Admr., v. Evansville, etc., R. R. Co.*, 143 Ind. 570. In the latter case it was said: "It is firmly settled by the decisions of this court that the transcript of the proceedings which comes to this court must affirmatively show, independent of the bill, that the latter was filed in the office of the clerk, and also the date of filing the same."

The paper found with the transcript in this case, and purporting to be a "bill of exceptions," is without any indications as to its filing, unless it be the file mark of the clerk, "July 16, 1894." Within the bill, and near its close, are statements, signed by the judge, showing that it was presented to him June 29, 1894, and signed July 14, 1894. The certificate of the clerk, following and attached to the bill, makes no statement as to its filing.

In addition, the bill, in connection with the file marks and the clerk's certificate, shows that it was incomplete at the time it was signed by the judge. While there is nothing to show when the bill was filed, or whether it was ever filed, yet it does appear that the longhand manuscript was filed with the clerk on July 16, 1894, two days after the bill was signed by the judge. But the statute requires, as often held, that the longhand manuscript shall be filed in the clerk's office before it is incorporated in the bill of exceptions. After the bill is thus prepared, with the longhand manuscript incorporated therein, the bill so completed is ready to be presented to the judge for his examina-

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tion or correction and signature. When the bill is signed, it also must be filed in the clerk's office. These things were not done, and the evidence is therefore not in the record. *Holt v. Rockhill*, 143 Ind. 530; *DeHart v. Board, etc.*, 143 Ind. 363; *Smith v. State, supra*; *Ayers v. Armstrong*, 142 Ind. 263.

Besides, we may add, that even if the evidence were before us, there could be no reversal of the judgment for the reasons urged by appellant. The jury found expressly that there was no marriage contract between the parties. The correctness of this finding is not questioned by appellant; for, although the third reason given for a new trial is that the court erred in requiring the jury to find whether there was such a contract, yet this assignment is passed without discussion in the voluminous briefs of appellant. It would also appear from the evidence, if we might refer to it, that there was abundant testimony to sustain both the general verdict and the answer given to the special interrogatory.

Almost all, if not all, the rulings of the court objected to refer to evidence which might have been important as affecting the amount of damages to be awarded appellant, had there been a contract of marriage proved. As there was in fact no contract of marriage, any ruling of the court bearing upon the question of damages must be harmless. We do not find, moreover, that there was any error as to the admission or exclusion of such evidence. On the contrary, we think that the case in this, as in other respects, and with all its very earnest contentions on each side, was carefully tried by the court.

Much is said as to evidence admitted and excluded under the fourth paragraph of the answer. This paragraph had called in question the good character of the life led by appellant before the time of the alleged con-

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tract of marriage; the paragraph of answer was afterwards withdrawn, and appellee asked also to withdraw the depositions filed in support of said paragraph, which request was refused by the court. The court allowed the paragraph and also evidence offered under it to be read to the jury over the objections of appellee. We think the evidence so allowed was proper as going to the question of damages, had there been a contract of marriage between the parties and a judgment for damages rendered in favor of appellant for breach of the contract. The rulings, as a whole, in this matter were favorable to appellant; and she has no cause to complain of them.

Appellant's motion to tax costs was sustained in part and overruled in part; and was as favorable to appellant as she could rightfully ask. The affidavits and counter-affidavits filed show that appellee's witnesses were retained only so long as necessary for his legitimate defense.

The case, as we believe, was fairly tried.

Judgment affirmed.

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[No. 17,916. Filed November 18, 1896.]

DEED.—*Delivery.*—*Parol Agreement to Convey Real Estate.*—A parol agreement to convey real estate, followed by the signing and proper acknowledgment of a deed which is never delivered, vests no title in the grantee.

APPEAL AND ERROR.—*Longhand Manuscript.*—*How Incorporated in Bill of Exceptions.*—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the office of the clerk before it is incorporated in the bill of exceptions.

From the Rush Circuit Court. *Affirmed.*

Cortez Ewing and *Davison Wilson*, for appellants.

B. F. Bennett and *T. E. Davidson*, for appellee.

146	235
146	257
147	220
147	302
147	576
146	235
148	175

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JORDAN, J.—Appellee commenced this action to foreclose certain mortgages executed by the appellants upon the real estate therein described. Appellant, Patrick Rogers, filed his answer in four paragraphs, the first being a general denial, the second averred payment, and the third alleged that the defendant had sold and conveyed to the plaintiff the mortgaged premises for the sum of \$4,250.00, which amount it was alleged was due and unpaid, and he sought to set off this amount against plaintiff's demand and prayed judgment over for the remainder due. The fourth paragraph was by way of cross-complaint, and it averred a sale and conveyance of the mortgaged realty by the defendant, Rogers, to the plaintiff for the agreed price of \$4,250.00, which it alleged he had failed to pay, and a vendor's lien was sought to be enforced against the land for the said purchase-money.

A trial resulted in a special finding of facts and conclusions of law in favor of appellee, upon which he was awarded a judgment foreclosing the mortgages in controversy. After finding the facts necessary to entitle appellee to recover upon his notes and mortgages in suit, the special finding proceeds as follows:

"3. That on or about the 18th day of October, 1894, said Patrick Rogers proposed to the plaintiff to sell him the real estate, above described, for the sum of \$4,250.00. The land to be taken subject to the taxes on the same for the last half of 1894, possession to be given October 1, 1895, grantors to have the right to remove crops raised and matured on the land during the year 1895, but the grantee to have the right to sow small grain on the farm in the fall of 1895. The notes held by plaintiff against said Patrick Rogers, including a note for \$60.00, dated May 31, 1892, seven per cent. interest to be taken at their amounts in cash by

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said plaintiff. That said proposition was accepted by plaintiff, but that no writing or memorandum was made or signed by either of the parties embodying the terms of said contract, but that the same rested wholly in parol. That afterward, on said day, a deed of conveyance embodying the terms of said contract was drawn, signed and acknowledged by said Patrick Rogers and Annie Rogers, his wife; that at the time of the pending of said negotiations for the sale of the land there was a misunderstanding and disagreement between the parties as to the amounts due on said notes, sued on in this action, amounting to the sum of \$560.00, of which disagreement the plaintiff had at the time no knowledge.

“4. That the said deed of Patrick Rogers was never delivered.”

The theory of both the third and fourth paragraphs of the answer under which appellant, Patrick Rogers, sought to secure affirmative relief, was that prior to the commencement of the action there had been a sale and conveyance by deed of the lands embraced in the mortgages mentioned in the complaint, by him to the appellee, and that the title to the real estate in dispute had been, by means of this deed of conveyance, vested in the latter. The burden rested upon appellant to establish these essential facts, before he was entitled to a recovery under either of the aforesaid mentioned paragraphs of his answer.

The special finding discloses that, on October 18, 1894, a proposition was made to sell the real estate to appellee for \$4,250.00, which proposition was accepted by the latter; that the said proposition to sell the land upon the part of appellant, and the acceptance thereof upon appellee's part, “rested wholly in parol.” That subsequently to said date a deed of conveyance em-

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bracing the terms of the contract was signed by the appellants, but *never delivered*.

Under the issues, it is evident that these facts would not warrant a conclusion of law in favor of appellant. A delivery of a deed is essential to complete its execution, and in the absence of a delivery it has no valid existence, as a deed of conveyance, and therefore does not serve to vest title in the grantee. *Freeland v. Charnley*, 80 Ind. 132; *Anderson v. Anderson*, 126 Ind. 62.

As the finding discloses that the alleged agreement to sell and convey the realty was not carried into effect by the execution of a deed conveying the title to appellee, it is manifest, we think, that under the issues there could be no recovery of the alleged purchase-price. The court did not err in its conclusions of law.

The evidence introduced upon the trial was taken down by an official reporter, and it is sought to have the original longhand manuscript certified to this court. It does not affirmatively appear that the longhand manuscript was first filed in the office of the clerk before it was incorporated into the bill of exceptions, and under the holding of this court in *Carlson v. State*, 145 Ind. 650, and in *Manley v. Felty*, ante 194, the evidence cannot be considered as properly in the record. But disregarding this question, we have read and considered the evidence, and are of the opinion that it sustains the finding of the court, and that it would not have authorized a finding of facts in favor of the appellant's right of recovery.

Judgment affirmed.

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TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY
v. CITY OF SOUTH BEND.

[No. 17,864. Filed November 24, 1896.]

CITY ORDINANCES.—*Repeal of Ordinance by Implication.—Lights at Street and Railroad Crossings.*—A municipal ordinance requiring railroad companies to maintain an electric light of a certain specified power at each point where the road crosses a public street, and imposing a fine of \$50.00 for each violation thereof is impliedly repealed by a subsequent ordinance requiring all railroad companies to provide for the safety of citizens and others by maintaining electric lights at such points as are therein specified, and imposing a penalty of not less than \$25.00, nor more than \$100.00 for every train run over such crossing where a light is not kept and maintained.

SAME.—*Repeal of During Progress of Prosecution.*—Where, during the progress of a prosecution for the violation of a city ordinance such ordinance is repealed by implication, without reservation as to pending actions thereunder, the prosecution must fail.

From the St. Joseph Circuit Court. *Reversed.*

Miller, Winter & Elam, and S. D. Miller, for appellant.

Wilbert Ward, for appellee.

JORDAN, C. J.—The appellant was convicted for failing to obey the provisions of a penal ordinance adopted by appellee's common council, requiring the former to place, keep and maintain an electric light at a point where its railroad crosses a certain street in said city.

The errors assigned are:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. That the court erred in overruling the motion for a new trial.

It is charged in the complaint that: "The defendant, on the 13th day of February, 1894, at the city and county aforesaid, violated section 1 of ordinance No.

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936, passed by the common council, on the 28th day of November, 1893, by then and there failing to place, keep and maintain, at the point where the track of said railroad company crossed Sample street, an electric light of two thousand nominal candle power."

The ordinance alleged to have been violated by the appellant, is based upon an act of the legislature, approved March 4, 1893 (Acts 1893, p. 302), being an act authorizing common councils of cities to require railroad companies to keep and maintain lights where streets and railroads cross.

The appellant challenges the validity of the ordinance upon several grounds, but its principal insistence is that the ordinance had been repealed, prior to the trial and conviction of appellant thereunder. The trial in the circuit court on appeal from a judgment rendered in the mayor's court, occurred on June 8, 1894, and a fine of \$20.00 was assessed against the appellant for the alleged offense.

The record discloses the following facts: The ordinance, No. 936, under which appellant was tried and convicted, was passed by the common council of appellee's city, on November 28, 1893. On April 23, 1894, ordinance No. 943, relating to the same subject-matter was adopted by the common council, and was in force at and prior to the date of the appellant's conviction in the lower court. Section 1 of ordinance 936, provides that: "All railroad companies whose tracks cross or intersect any public street of the city shall place, keep, and maintain at all points where such railroad crosses any public street, an electric light of 2,000 nominal candle power, which shall be kept burning every night from twilight until dawn." Section 2 fixes the penalty for a failure to comply with the ordinance at a fine not exceeding \$50.00. The ordinance last adopted contains seven sections. The first sec-

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tion declares: "That it shall be the duty of all railroad companies running and operating a railroad through the city of South Bend, to provide for the security and safety of the citizens and other persons, from the running of trains through the city, by keeping and maintaining electric lights at such points and for such times as are hereinafter specified." By subsequent sections the railway companies and the points at which the same are to maintain lights, and the time of night during which they are to be kept lighted, are specially mentioned. It was therein provided that appellant was to keep an electric light all night at the crossing of Tutt and Sample streets, and a midnight light at the crossing of Grant and State streets. A penalty of not less than \$25.00, nor over \$100.00, was fixed to be assessed upon conviction against any company for every train run by it over any crossing where such light was not kept and maintained. There was no saving clause expressed in this ordinance, applying to prosecutions under the former ordinance. Both ordinances, upon the trial, were introduced in evidence, but the court finally, over the objections and exceptions of appellant, struck out and refused to consider the one passed April 23, 1894. This ruling of the court was assigned by appellant as one of its reasons for a new trial. Counsel contend that this ordinance was material and legitimate evidence, for the reason, insisted by them, that it covers the entire subject-matter of the ordinance under which appellant was convicted, and operated as a repeal of it by implication. It is claimed, therefore, that had ordinance 943 been in evidence it would have established that 936 had been repealed, without any reservation, consequently this prosecution could not have been main-

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tained, and therefore the trial court erred in excluding the ordinance.

Upon an examination of these respective ordinances, it is evident, we think, that the last adopted covers the whole subject-matter of the one for the violation of which the appellant was convicted. The first ordinance, as it appears, required an "electric light of 2,000 nominal candle power," while the second did not provide for a light of any specified power. The penalty fixed by the first for a violation of its provisions might be in any sum not exceeding \$50.00, by the second, it could not be less than \$25.00 nor over \$100.00. The last is more specific and certain in its provisions, and it prescribes a higher or different penalty for the offense. These two ordinances seem to be so materially inconsistent with each other that they cannot stand together, and we are of the opinion that the council clearly intended, in adopting the new ordinance, that it should supersede and take the place of the older, which embraced the same subject-matter, consequently, this would result in a repeal by implication.

The general rule applicable to statutes is that, where a new statute covers the whole subject-matter of an older one, adds new provisions, prescribes different penalties, and is evidently intended to supersede and take the place of the prior act, the latter is repealed by implication. *Wagoner v. State*, 90 Ind. 504, and cases there cited; *Thomas v. Town of Butler*, 139 Ind. 245, and cases cited.

The rules which control the repeal of statutes by implication are equally applicable to questions arising relative to municipal ordinances. *Horr and Bemis*, *Munic. Ordinances*, section 63.

In section 197, same authority, it is said: "If, during the progress of a prosecution, the ordinance on which

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it is based is repealed, the prosecution must fail, unless the repealing ordinance contains some express provisions whereby all pending prosecutions are saved from its operation."

We think that if the ordinance had remained in evidence and been considered by the court, it would have established that the one upon which the prosecution of appellant was founded had been repealed, during the progress of the prosecution, without any reservation as to pending actions thereunder, and this would have resulted in a failure of the action.

It follows that the court erred in striking out the ordinance in question, for which error the judgment is reversed and the cause remanded, with instructions to the lower court to grant appellant a new trial.

HOWARD, J., was absent.

MAKEPEACE v. BRONNENBERG ET AL.

[No. 17,865. Filed November 24, 1896.]

GUARDIAN AND WARD.—*Habitual Drunkard.—Limitation of Action.*

—*Statute Construed.*—A habitual drunkard under guardianship is not under legal disability within the meaning of section 297, Burns' R. S. 1894.

SAME.—*Habitual Drunkard.—Discharge of Guardian.—Presumption.*

—The discharge of a guardian appointed for a habitual drunkard will be presumed to be the result of a finding in accordance with section 5745, Burns' R. S. 1894, that the ward had reformed by abstaining from the use of intoxicating liquors.

SAME.—*Habitual Drunkard.—Powers and Duties of Guardian.*—The guardian of a habitual drunkard is invested with all the powers of a guardian of a minor, and under the provisions of section 2685, Burns' R. S. 1894, it is his duty to appear and defend all suits against his ward.

APPEAL AND ERROR.—*Bill of Exceptions.*—A bill of exceptions must be signed by the judge before it is filed with the clerk.

From the Henry Circuit Court. *Affirmed.*

F. A. Walker, J. N. Templer, R. S. Gregory, A. C. Silverberg, W. A. Brown and James Brown, for appellant.

146	243
147	652
148	243
149	593
150	668
151	331
152	366
146	243
156	104
146	243
159	368
146	243
161	371
161	398

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M. E. Forkner, H. D. Thompson, H. C. Ryan, J. W. Layne and E. E. Hendee, for appellees.

JORDAN, C. J.—This action was commenced by appellant in the Madison Circuit Court, and on motion the cause was venued to the Henry Circuit Court.

By the first paragraph of the complaint appellant sought to quiet his title to the real estate therein described. The second, alleged a cause of action in ejectment, and demanded possession of the land in controversy and damages for its detention. The fourth paragraph is quite lengthy and is replete with numerous charges of fraud, etc. It alleges, among other things, that Allen Q. Makepeace, the appellant, from 1870 to 1889, was a habitual drunkard, incapable of transacting any business; that in the year of 1874, the court, upon the finding of such facts, appointed a guardian for him; that he continued under such guardianship until 1889, in which year the guardian was discharged. After averring that in 1871 appellant became the owner of a large amount of property, both real and personal, by descent from his deceased father, which property, it is alleged, was of the probable value of \$200,000.00, this paragraph then proceeds to assail several judgments and decrees of the circuit court of Madison county, Indiana, under and through which the appellees, it is alleged, claim title to the real estate mentioned in the complaint. This paragraph in question seeks to attack the proceedings of the court and the title of appellant to the real estate upon the ground of fraud on the part of one Edgar Henderson, through whom appellees claim to be the owners of the lands in dispute. It also charges that through the fraudulent designs and acts of said Henderson the guardian of appellant was procured to commence an action for his said ward in the Madison

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Circuit Court against said Henderson and his wife, Eliza C. Henderson, to recover the land now in controversy, and that such fraud was perpetrated upon the court in said action; that said defendants, upon a cross-complaint filed by them, making the appellant and his guardian adverse parties thereto, secured a judgment quieting their title to the real estate in question. Knowledge of the alleged fraud is, by the averments of the pleading, imputed to the appellee, Bronnenberg, at the time Eliza Henderson sold the land to him. The paragraph closes with a prayer that the conveyances set forth, together with all judgments and decrees of the court upon which the same rest, be set aside and adjudged null and void, and the plaintiff's title be quieted, and a commissioner be appointed by the court to convey the land to plaintiff. Appellees, Henry Bronnenberg and Eliza C. Henderson, each separately answered the complaint by a general denial, and by other paragraphs setting up affirmative matter. These answers substantially aver the same facts, and a determination of the questions raised as to one will be decisive of those relating to the other.

The fourth paragraph of appellee, Bronnenberg's, answer was addressed to the first and fourth paragraphs of the complaint, and it was therein alleged that the cause of action set out and stated in each of said paragraphs did not accrue within fifteen years before the commencement of the action. A demurrer was overruled to this paragraph, and counsel for appellant insist that in this the court erred. They say, especially, that this was error so far as the answer was intended as a defense to the fourth paragraph of the complaint, for the reason urged that the facts in the latter disclose that appellant, at the time the cause of action arose, was under a legal disability; a guardian

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having been by the court appointed for him by reason of the fact that he was a habitual drunkard. Section 297, Burns' R. S. 1894, provides that "Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." By section 1309, Burns' R. S. 1894 (1285, R. S. 1881), the legislature defined the phrase "under legal disabilities" as including infants, persons of unsound mind, or those imprisoned in the State prison or out of the United States. Habitual drunkards are not embraced or included within this provision of the statute.

Again, it appears that this action was not commenced until 1893, and it is shown by the fourth paragraph of the complaint that the court discharged appellant's guardian in 1889. The discharge of the guardian, we must presume, was the result of the court finding under and in accordance with section 5745, Burns' R. S. 1894 (4320, R. S. 1881), relating to habitual drunkards, that the ward had reformed by abstaining from the use of intoxicating liquors. It appears that over three years had elapsed after the removal of the alleged disability upon which counsel base their contention, before this action was instituted; hence, if we were to concede counsel's insistence to be correct, it would follow that appellant has not brought himself within the two years' limit provided by section 297, *supra*.

Appellant also insists that the sixth paragraph of appellee's answer is insufficient. The facts therein averred, in substance, appear to be as follows: That on January 5, 1878, one Edgar Henderson became the owner of the real estate in controversy by virtue of a sheriff's sale had upon certain judgments rendered in the Madison Circuit Court, on November 1, 1873, against the appellant, and in favor of the First Na-

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tional Bank of Anderson, Indiana; that on October 16, 1882, appellant, by Solomon Myers, his guardian, commenced an action in ejectment for the recovery of the real estate in question, in the Madison Circuit Court, against Edgar Henderson and Eliza C., his wife, who were then the owners and in possession of said real estate; that said defendants filed a general denial in said action, as their answer, and said Eliza C. Henderson, who had become the owner of the lands by a conveyance from her said husband, filed, on January 5, 1883, her cross-complaint therein against appellant, wherein she alleged that she was the owner of the land, and asked to have her title quieted; that appellant, by his said guardian, filed a general denial to said cross-complaint, and on the 15th day of January, 1883, such proceedings were had thereon in said action, which upon a trial resulted in the court adjudging that appellant had no title to the land now in question, and in decreeing that Mrs. Henderson's title to the same be quieted. That all questions relating to the title of said real estate were, in said action, fully and finally adjudicated between appellant and said Henderson, and appellant has acquired no other title since the rendition of said judgment. It is further averred that appellee, Bronnenberg, relying upon said decree, and upon the faith thereof, purchased the land in dispute from said Eliza C. Henderson and paid her for the same a full and valuable consideration; that after all disabilities under which appellant labored had been removed, he executed to Bronnenberg a deed of conveyance for said land.

The objections urged to this paragraph are that the guardian of appellant was not, under the law, authorized to commence an action for the recovery of his ward's lands.

It is not necessary for us to consider this question,

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as it is shown from the alleged facts that the decree quieting the title of Mrs. Henderson, through whom appellee claims to have become the owner of the land, was rendered upon her cross-complaint, which made the appellant a party defendant thereto. To this cross-action his guardian seems to have appeared and filed an answer in behalf of his ward. By section 1 of the statute providing for the appointment of a guardian for a habitual drunkard—section 5743, Burns R. S. 1894—such guardian is invested with all the powers and duties of a guardian of a minor. Clause 5 of section 2685, Burns' R. S. 1894, makes it the duty of such latter guardian to appear and defend all suits against his ward; and in the event he does, it is not necessary for the court to appoint a guardian *ad litem* for the ward. *Hughes v. Sellers*, 34 Ind. 337; *Garrigus v. Ellis*, 95 Ind. 598. See *Jones v. Crowell*, 143 Ind. 218.

Appellant's guardian being empowered by the statute to appear and defend all suits brought against his ward, and having appeared in behalf of the latter, and defended the suit to quiet title, instituted by the cross-complaint of Mrs. Henderson, the appellant is bound by the decree rendered, and is thereby precluded, under the circumstances, from asserting any adverse interest or title to the land against the appellee. Consequently, the facts alleged in the paragraph in question discloses a complete defense to the cause of action as alleged in the complaint, and the court did not err in overruling the demurrer to this paragraph of the answer.

At the close of the evidence the court instructed the jury to return a verdict for the defendants. Questions relating to this latter ruling, and also others depending upon the evidence, are discussed and urged for our determination by the learned counsel for appellant. These questions, however, we cannot consider, for the

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reason that the evidence is not in the record. Time was granted by the court for the filing of bills of exceptions. The transcript shows that what purported to be a bill of exceptions, embracing the evidence and the instructions given and refused by the court, was filed on May 22, 1894. This bill, it appears, did not receive the signature of the trial judge until June 20, 1894, and there is nothing to show that it was ever filed on or after this latter date. It is therefore manifest, so far as the record discloses, that the only filing of the bill in question occurred May 22, 1894, nearly a month before it was signed by the judge. The settling and signing of a bill of exceptions is a judicial act, and in the absence of the judge's signature it can have no existence or validity. After it has received his signature it must be filed in order to become a part of the record. It follows, therefore, that the bill, for the reasons stated, is not in the record and serves no purpose in this appeal.

There being no available error, the judgment is affirmed.

JOSEPH ET AL. v. WILD.

[No. 17,798. Filed November 24, 1896.]

LICENSE.—Revocation.—A license to erect an outside stairway to the upper story of a building on the land of another becomes irrevocable after the building has been erected, in reliance upon such license, at a large expense, without any other stairway.

SAME.—Easement.—An executed parol license may become an easement on the land of another and impose a servitude on one estate in favor of another.

CONTRACT.—Consideration.—W. and C. are the owners of adjoining unimproved lots. They enter into an agreement whereby W. in the construction of a building on his own lot is to construct a wall on the partition line, which wall is to used by both, when C. has erected an adjoining building. Until the erection of such adjoining

146	249
146	582
146	249
148	535
151	574
148	249
154	570
155	28
146	249
161	119

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building and a permanent stairway built, W. to have the right to maintain over the land of C. an outside stairway. Acting upon this agreement W. constructs the building including the outside stairway. *Held*, That the contract is supported by a valuable consideration.

NOTICE.—The erection and maintenance for more than fifteen years of an outside stairway on the land of one person leading to a building on the land of another is sufficient notice of an agreement between the two for the construction of such stairway, to all persons claiming under the former.

PRACTICE.—*Harmless Error.*—Error in sustaining a demurrer to one paragraph of answer is harmless where all the evidence which could have been given thereunder is admissible under a general denial which is pleaded.

CONTRACT.—*Not Rescinded Because Parties Did Not Foresee all Consequences.*—An agreement between two persons supported by a sufficient consideration, by which one is allowed to maintain an outside stairway to his building over the land of the other, will not be rescinded on the ground that the land has greatly increased in value since the agreement was made.

APPEAL.—*Longhand Manuscript.*—*How Made Part of Record.*—The record must affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was embodied in the bill of exceptions.

From the Hamilton Circuit Court. *Affirmed.*

William Booth and Fertig & Alexander, for appellants.

Shirts & Kilbourne, for appellee.

MONKS, J.—This action was brought by appellee, against appellants, to enjoin them from tearing down a stairway, the property of appellee. It is alleged, in the complaint, that appellee was, in 1880, and still is, the owner of certain real estate (describing it) in the city of Noblesville, Hamilton county, Indiana, and that one Haymond W. Clark was the owner of a strip of real estate thirty-five feet in width adjoining appellee's said property on the north, which was unimproved; that at said date appellee had decided to improve his said real estate, the same fronting on the

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public square in said city by the erection of a two-story business block thereon. That it was the purpose of said Clark to improve his portion thereof, but he was not ready then to do so. It was agreed between appellee and said Clark that appellee should proceed to build his said two-story business block, putting the north wall thereof upon the line between the real estate owned by appellee and said Clark, and that when said Clark should improve his own property he should have the use of said wall so put up by appellee. In consideration of which it was agreed that until said improvement should be made appellee should have the right to egress and ingress into the second story of his block by way of an outside stairway resting upon said real estate of said Clark, and that when a building should be erected on the strip of ground then owned by said Clark, that a permanent stairway should be constructed along the north side of said wall, leading from said public square, so as to furnish ingress and egress to the second stories of each of said buildings. Pursuant to said agreement, in the year 1880, appellee did so improve his portion of said property by the erection of said two-story business block, and did so construct said outside stairway along the north wall of said building and leading from the public square, which has ever since been the sole and only means of egress from and ingress to the second story of the business block built by appellee, and the said stairway has been openly and continuously maintained at all times since by appellee without objection. That appellee, relying upon the agreement with said Clark, erected said building with a view to have thereafter a permanent joint stairway, and constructed said outside stairway to obtain access to said second story until the permanent stairway was built, and has maintained it ever since. That after-

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wards, appellants, Nelson & Nelson, became the owners of the ground formerly owned by said Clark, and the same has not been improved by the erection of any permanent buildings thereon; that they are threatening to tear down and remove said stairway and prevent appellee from having access to the second story of his said building, etc. That there are five rooms in said second story, the only access to which is by way of the stairway aforesaid, and four of said rooms are now occupied by tenants, and if said stairway is removed, as threatened, such tenants would have no means of access thereto. After the commencement of said action appellants, Joseph & Joseph, purchased the real estate formerly owned by Clark, of their co-appellants, and were, on their own application, made defendants to said action. Appellee filed a supplemental complaint, setting up the fact of their purchase and that they claimed the right to tear down said outside stairway, etc. Appellants each filed separate demurrers, for want of facts, to the complaint and supplemental complaint, which were overruled. Appellants, Joseph & Joseph, filed an answer in five paragraphs, and appellee's demurrer to each paragraph thereof, for want of facts, was sustained to the second and fifth paragraphs, and overruled as to the other paragraphs.

The cause was tried by the court and a finding made in favor of appellee, upon which judgment was rendered against appellants.

Appellants, Joseph & Joseph, filed a motion to modify the judgment and for a new trial, which were respectively overruled.

The said rulings of the trial court against appellants are each assigned as error.

The first proposition urged is, that the complaint is bad for the reason that the parol contract set forth is void under the Statute of Frauds.

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The allegations in the complaint show that appellee, pursuant to the contract alleged and relying thereon, erected the two-story business block and placed the north wall on the line dividing his real estate from that owned by Clark, the other party to the contract, and that he built the outside stairway along the north side of said north wall leading to the second story of said building, and that no provision was made for ingress to or egress from said second story except by this stairway, and that without the same no access could be had to the second story of said building, and that said stairway has been continuously maintained and used for more than fifteen years without objection. These allegations show a performance of the contract by appellee on his part. Regarding the contract as a mere license to erect the outside stairway, a large sum of money having been expended in the erection of said building on the faith thereof, and the stairway having been constructed on the faith thereof, the same has been executed by appellee, and must be deemed irrevocable. *Ferguson v. Spencer*, 127 Ind. 66; *Nowlin v. Whipple et al.*, 120 Ind. 596; *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Hodgson v. Jeffories*, 52 Ind. 334; *Parish v. Kaspere*, 109 Ind. 586; *Burrow v. Terre Haute, etc., R. R. Co.*, 107 Ind. 432, and cases cited; *Simons v. Morehouse*, 88 Ind. 391; *Nowlin v. Whipple*, 79 Ind. 481; *Snowden v. Wilas*, 19 Ind. 10; *LeFevre v. LeFevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Serg. & R. 267; *M'Kellip v. M'Ilhenny*, 4 Watts 317; *Swartz v. Swartz*, 4 Pa. St. 353; *Ebner v. Stichter*, 19 Pa. St. 19; 2 Am. Leading Cases, 570, 571, 573; Browne on Statute of Frauds (5th ed.), section 31, p. 39.

An executed parol license, however, may become an easement upon the land of another and may impose a servitude on one estate in favor of another. *Nowlin v.*

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Whipple, supra; *Hazleton v. Putnam*, 3 Pin. (Wis.) 107; 3 Chandler (Wis.) 117, 54 Am. Dec. 158 and note on p. 166; *Dark v. Johnston*, 55 Pa. St. 164; *Huff v. McCauley*, 53 Pa. St. 206; *Thompson v. McElarney*, 82 Pa. St. 174; *Meek v. Breckenridge*, 29 Ohio St. 642, 650; *Legg v. Horn*, 45 Conn. 409; 2 Am. Leading Cases, 557, 578; Washburn Easements (4th ed.), pp. 27-29.

It is next insisted that the complaint is bad because there was no consideration for the agreement. A valuable consideration may consist of any benefit, delay or loss to another party. *Starr v. Earle*, 43 Ind. 478, 480. The facts alleged in the complaint show a valuable consideration within this definition of the said words.

Under the well known maxim that, "that which is sufficient to put a party upon inquiry is notice," the erection and maintenance of the stairway for more than fifteen years on the real estate owned by Clark was sufficient notice of the contract and rights of appellee thereunder to all claiming under Clark. *Campbell v. Indianapolis, etc., R. R. Co.*, 110 Ind. 490, 493; *Robinson v. Thrailkill*, 110 Ind. 117, 119; *Ellis v. Bassett*, 128 Ind. 118, and cases cited.

Appellee also contends that the facts alleged in the complaint show that the contract remains unexecuted for the reason that Clark and his successors have received no benefit therefrom. It is stated in the complaint that the outside stairway was to remain for the use of appellee's building until such time as the adjacent owner should erect a building upon his land, at which time a permanent stairway was to be built for the use of both parties upon the line occupied by the outside stairway. The complaint shows that appellee has fully performed his part of the contract; that he has erected his building in good faith, relying upon

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the contract, and made no provision for access to the second story of his building, except by such outside stairway. Appellee is not seeking to compel the erection of the building and stairway adjoining his own under the contract; he only asks to enjoin appellants from tearing down the present stairway until such building and joint stairway are erected. Neither Clark, nor those claiming under him, are under any obligation to erect said building, but they have the right, under the contract, to do so whenever they see proper. But, under the facts alleged in the complaint, appellants have no right to tear down or otherwise interfere with the use of said stairway by appellee, or those claiming under him, merely because they have not exercised their privilege to erect a building and joint stairway, as provided in the contract. Until such time as the building and joint stairway are erected on the adjoining land, appellee and those claiming under him have the right to keep the outside stairway in repair and use the same without interference from appellants.

It is insisted by appellants, Joseph & Joseph, that the demurrer to the supplemental complaint should have been sustained for the reason that the supplemental complaint does not contain any averment that they threatened to tear down the stairway. The appellants, Joseph & Joseph, purchased the real estate described after the commencement of this action and after a temporary restraining order had been granted.

The supplemental complaint alleges "that said Josephs, and each of them, are now and still claiming the right to tear down and destroy said stairway, and claim that said appellant has no right to maintain the same," etc. Considering the complaint and supplemental complaint as one pleading, the objection urged is not tenable. It follows that the court

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did not err in overruling the demurrers to the complaint and supplemental complaint.

Appellants, Joseph & Joseph, next contend that the court erred in sustaining the appellee's demurrer to their fifth paragraph of answer. The error, if any, committed by the court in sustaining the demurrer to this paragraph of answer was harmless, for the reason that all evidence that could have been given under said paragraph was admissible under the first paragraph of answer, the general denial.

It is earnestly insisted that that part of the fifth paragraph of the answer which alleges "that when said contract was made the Clark real estate was not worth over \$50.00 per front foot, and has increased in value at this time to \$300.00 per front foot, and that the city of Noblesville has trebled in population and wealth * * and many other changed conditions, and that under the present conditions the granting of a perpetual injunction would be of actual advantage to appellee of \$1,500.00, and of loss to appellants, Joseph & Joseph, of a corresponding amount, by taking so much of their property and bestowing it on said appellants without consideration," was a good answer in bar.

The fact that the maintenance of said stairway will be of great value to appellee and loss to appellant was not sufficient to constitute a defense to the action. Parties cannot be relieved from their contracts and acts thereunder upon the sole ground that they did not foresee all their consequences. *Hodgson v. Jeffories*, *supra*, on page 338.

After the judgment was rendered, appellants, Joseph & Joseph, moved the court "to modify the same so as to provide that they or their grantees might at any time remove said stairway for the immediate purpose of erecting new and permanent build-

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ings on their ground adjoining appellee's said building, and that in erecting said new building said appellants, their heirs and assigns be not required to construct or provide any stairway for the use of appellee in lieu of the stairway now existing."

Appellee has the right, under the contract, as we have shown, to maintain said outside stairway until the building and joint stairway are erected on the adjoining lot. The only way appellants can end appellee's right to maintain said outside stairway is by erecting the building and joint stairway. It follows that the motion to modify the decree was properly overruled.

The questions presented by the motion for a new trial depend for their determination on the evidence. We cannot consider any question raised by the motion for a new trial for the reason that the evidence is not properly in the record.

The evidence in the cause was taken down by a shorthand reporter, and it is sought to certify the longhand manuscript of the evidence to this court under section 1 of an act approved March 7, 1873 (Acts 1873, p. 194). The record shows that the bill of exceptions was signed by the trial judge on October 23, 1895, and the record does not show that the longhand copy of the evidence was filed in the clerk's office before the bill of exceptions containing the same were signed by the judge.

It is settled law in this State that under said act of 1873, the longhand copy of the evidence must be filed in the clerk's office before it is embodied in the bill of exceptions and signed by the judge, and this fact must be affirmatively shown by the record. *Carlson v. State*, 145 Ind. 650; *Rogers v. Eich*, ante, 235; *Manley v. Felty*, ante, 194; *DeHart v. Board*, etc., 143 Ind.

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363 ; *Smith v. State*, 145 Ind. 176 ; *Beatty v. Miller*, ante, 231 ; *Hamrick v. Loring* (Ind. Sup.), 45 N. E. 107.

No available error appearing in the record, the judgment is affirmed.

HERRICK, ADMINISTRATOR, v. FLINN, ADMINISTRATOR.

[No. 17,805. Filed November 24, 1896.]

APPEAL.—*Error in Finding Should be Assigned on Motion for New Trial.*—Error in the finding of the trial court, to be available on appeal, should be assigned as error on the motion for new trial.

DECEDENT'S ESTATES.—*Sale of Real Estate to Pay Debts.—Descent.*—

Where in an action by administrator to sell real estate to pay debts, the wife and judgment creditors of one of the heirs appear and become parties to the proceedings, the judgment creditors asking that their respective liens be transferred to the proceeds of the sale, and the wife claiming that she is entitled to one-third of the surplus of the proceeds, and it is agreed in open court that the sale should take place and the rights of all parties be transferred to the fund, and the sale is accordingly made, and thereafter the wife dies, her interest, if any, in such fund does not go to her personal representative, but in accordance with section 2671, Burns' R. S. 1894, descends to her husband.

From the Wabash Circuit Court. *Affirmed.*

Alvah Taylor, for appellant.

H. C. Pettit, *O. H. Bogue* and *A. N. Grant*, for appellee.

MCCABE, J.—The appellee, as administrator of the estate of Joseph H. Ray, deceased, filed a petition in the Wabash Circuit Court, asking an order to sell certain real estate, situate in the city of Wabash, of which said Joseph H. died seized, for the purpose of making assets to pay the debts of said decedent.

Said real estate, by law and the provisions of the will of said Joseph H., went to three of his heirs, one

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of whom was his son, Webster B. Ray, who was, among others, made a party to said proceeding.

Numerous creditors of said Webster B. filed petitions, became parties to said petition to sell before any sale of the real estate, and showed that they had recovered judgments against said Webster B., and that said judgments had become liens on the interest of said Webster B. in said real estate by reason of such judgments being either rendered in the Wabash Circuit Court or by transcript thereof being filed and recorded in the clerk's office of said court. And they further showed that there would probably be a surplus of the proceeds of the sale by the administrator over and above the debts of said Joseph H. Ray, deceased; and they asked that their respective liens on Webster B. Ray's interest be transferred to his interest in the surplus of the fund arising from any sale that might be made thereof on such petition. The wife of said Webster B. appeared and became a party, showing that she was the wife of said Webster B. when his father died, and that she was still his wife and claiming as against her husband's said judgment creditors, that she was entitled to the one-third of her husband's share of the surplus of the proceeds of said sale.

It was agreed by and between all the parties in open court that the sale should take place, and the rights of all the parties in the real estate should be transferred to the fund, which was accordingly ordered by the court. The real estate was accordingly sold and the deed made on June 16, 1891.

Louisa A. Ray died on December 10, 1891, leaving surviving, her said husband, Webster B. Ray, and several children; and on February 16, 1892, appellant, George T. Herrick, was appointed administrator of the estate of said Louisa A. Ray, deceased.

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Appellant was then admitted a party to said proceedings, and he filed an answer to the claims of the judgment creditors of said Webster B. Ray as to one-third of his share of the surplus of said fund, claiming that such amount of such surplus vested in said Louisa by virtue of the statute on the subject of judicial sales of real estate of a man having a wife. Burns' R. S. 1894, section 2669 (R. S. 1881, 2508).

The circuit court sustained a demurrer to the answer of the administrator of said Louisa, setting up these facts. This ruling and the finding of the court in favor of the lienholders are assigned for error. If the finding was supposed to be erroneous it should have been made a ground for the motion for a new trial, and overruling that motion should have been assigned for error; otherwise the error, if any there was in the finding, is unavailable. The circuit court overruled appellant's motion for a new trial, but such ruling is not assigned for error.

The statute referred to provides that: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise." 2669 (2508), *supra*.

Another section of the same act provides that: "If any married woman shall die, holding real property vested in her by the provisions of this act, during the

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existence of the marriage in virtue of which she received the same, the whole of such real property shall descend to her surviving husband."

By agreement of the parties the court ordered all the rights of the parties in and to the real estate to be transferred from the real estate to the fund arising from the sale. So that the fund must be treated as the real estate. And, by virtue of the statute last above quoted, it must be held to descend to the husband of the deceased wife, and that her administrator had no right to it at all, even if she had been entitled to it had she lived, which we do not decide. *Summit v. Ellett*, 88 Ind. 227.

Therefore, the circuit court did not err in sustaining the demurrer to the answer of the administrator.

Judgment affirmed.

BURNS v. WINDFALL MANUFACTURING COMPANY.

[No. 17,816. Filed November 24, 1896.]

146	261
148	465
148	466
146	261
153	110

MASTER AND SERVANT.—*Defective Machinery.—Complaint.*—In an action by an employe against his employer for personal injuries caused by defective machinery, a complaint alleging a knowledge both on the part of the employe and employer as to the defect, and a promise on the part of the employer to remedy the same, is not sufficient to withstand a demurrer unless it is further alleged that after the knowledge and promise on the part of the employer, a reasonable time had intervened before the accident for the employer to have remedied the defect.

From the Tipton Circuit Court. *Affirmed.*

L. B. Nash, for appellant.

Dean & Dean, and *Beauchamp & Mount*, for appellee.

HACKNEY, J.—The question in this case is the sufficiency of a paragraph of complaint by the appellant

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against the appellee. It was alleged that the appellant was employed in hauling clay from a pit into appellee's tile mill by means of cars pulled up an inclined railway, in which employment he was required to ride upon such cars; that while returning to the pit, on the occasion in question, the car in which he was riding struck a point where the ends of two of the rails of said way reared up and overlapped, causing said car to stop suddenly, thereby precipitating the appellant to the ground and inflicting the injuries complained of. It was alleged that the condition of the track was known to the appellee, and was negligently and carelessly permitted so to remain. It was alleged, also, that the appellant was free from fault or contributory negligence.

The following allegation supplies the principal point of contention upon the pleading: "The plaintiff, at the time of said injury, was aware of the defective condition of said track, and had been for several days prior thereto (the exact time plaintiff being unable to state), but because of a promise made by defendant to repair said defects, plaintiff remained in defendant's service, and, relying upon said promise, being led to believe that said repairs would be made at the earliest possible convenience, and but for such promise and understanding, plaintiff would not have remained in defendant's employ, and plaintiff would aver that the condition of said track was not so dangerous that a man of ordinary prudence would have refused to assume the risk."

The appellant relies upon the following proposition and authorities: "A servant who learns of defects in machinery about which he is employed, and gives notice thereof, but is induced to remain in the service by a promise of the master to remedy the defect, may recover for an injury caused thereby, where it oc-

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curs within such time after the promise as would be reasonably allowed for its performance, and where it is not so imminently dangerous that a man of ordinary prudence would refuse to work about it." *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Rothenberger v. Northwestern, etc., Co.* 57 Minn. 461, 59 N. W. 531; *Schlitz v. Pabst, etc., Co.* 57 Minn. 303, 59 N. W. 188; *Graham v. Newburg, etc., Co.*, 38 W. Va. 273, s. c. 18 S. E. 584; *Chicago, etc., Co. v. VanDam*, 149 Ill. 337, s. c. 36 N. E. 1024; *Madra v. Pottsville, etc., Co.*, 160 Pa. St. 109, 28 Atl. 639; Am. and Eng. Ency. of Law, Vol. 4, pp. 34, 64.

Counsel for the appellee insist that the exception to the rule that the servant assumes the hazards incident to such defects as he has knowledge of does not prevail, even where the master agrees to make timely repairs, if the servant, while continuing in the use of the defective appliance, has plainly before his view the yet unrepaired defects. In other words, that the exception prevails where the defect, which is promised to be repaired, is latent, and does not prevail where such defect is patent. In support of this position counsel cite the statement of Wharton that "The only ground on which the exception before us can be justified is, that in the ordinary course of events the employe, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employe sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it." Wharton's Negligence (2d ed.), section 220.

The case of *Graham v. Newburg, etc., Co.*, *supra.*, is cited, and the exception is there stated as follows: "An employe, knowing of defects in machinery, appliances, or his working place, is not precluded, by

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continuing in the service, from recovering damages for injuries by reason of such defects, where he is lulled into a sense of security by the words, acts, or conduct of his employer, and the danger is not so plain and obvious that a prudent, careful man, anxious for his safety, ought not to risk it."

We need not pursue the inquiry as to whether the exception has its support in the reason that the servant, relying upon the master's promise, may presume that the defect has been cured, although we know of no better reason for it, or whether that reason is consistent with the statement of the exception that it obtains where the injury occurs "within such time after the promise as would be reasonably allowed for its performance." The complaint, in this case, did not, in our opinion, allege facts sufficient to support a recovery upon any recognized statement of the rule and the exception. By it we are advised that the appellant was aware of the defect for several days before the injury, but we are not advised that the appellee had notice of it and had promised to repair it for a time within which the repair could reasonably have been made. There is an entire absence of allegation as to the time appellee had known the defect or had promised to repair it. It may have been during all of the time that the appellant knew of it, or it may have been at the moment the car was started down the track to the pit, and when repair was impossible before the car went upon it.

When knowledge was admitted the burden rested upon the appellant to bring the case within the exception.

The defect in the track must have been open and a knowledge of it unavoidable each time the car passed over it. No change in its condition, from the appellant's first knowledge of it, is alleged; no negligence in

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running the car is alleged, and, upon the facts pleaded, it is a reasonable presumption that each time the car went upon it the concussion was considerable.

In the most favorable view for the appellant, of the conflicting theories of the parties, the case would turn upon the presence of allegations disclosing that the appellant had not continued in the use of the defective track, after a knowledge of its condition, for such time that the appellee, having promised to repair it, might reasonably have been presumed, by the appellant, to have made or abandoned such repairs.

The pleading supplied no facts for the application of the presumptions, either that appellant had continued to use the track after the appellee's promise to repair had been delayed an unreasonable time, or that the appellee had had any reasonable time, after the promise, in which to make the repairs.

Finding the complaint insufficient, the court did not err in sustaining the demurrer thereto.

Judgment affirmed.

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146 285
150 555

[No. 17,828. Filed November 24, 1896.]

COURTS.—*Special Judge.*—The regular judge of a circuit court, who, because of his disqualification, appoints a special judge to hear an action for the foreclosure of a mortgage, may after a decree of foreclosure and a personal judgment in the action, and at the same term of court, appoint another special judge to hear an application for the appointment of a receiver of the rents of the land, and such latter appointee has jurisdiction to hear and determine the application.

RECEIVERS.—*Sufficiency of Petition.*—*Mortgage.*—A petition, subsequent to a personal judgment and decree of foreclosure of a mortgage, for the appointment of a receiver of the rents and profits of

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the real estate is sufficient, where such petition discloses that the property is inadequate to secure the debt, that the debtor is insolvent, that the mortgagors do not occupy the property, and that the security is in peril from the lapse of insurance and the maturity of taxes.

SAME.—Mortgage.—Debtor's Right of Exemption.—Where a decree for the foreclosure of a mortgage has been procured, the right of the debtor to exemption of the rentals of the mortgaged property is no objection to the appointment of a receiver of rents upon a showing that the debtor is insolvent and the security inadequate, where the order directs the receiver to apply the rentals to insurance and taxes, and to retain the balance subject to the future order of the court.

From the Hendricks Circuit Court. *Affirmed.*

Charles Foley, for appellants.

Hogate & Clark and *Cofer & Hadley*, for appellee.

HACKNEY, J.—The appellee, the United States Savings Fund and Investment Company, obtained a personal judgment against the appellant, John W. Harris, and the foreclosure of a real estate mortgage against him and his wife, Lottie B. Harris, who is also an appellant herein.

Because the regular judge of the lower court was interested in the appellee company, he appointed the judge of another circuit to preside in said cause as special judge. After the judgment and decree above mentioned were duly entered and signed by said special judge, but during the same term of court, the appellee filed a petition against the appellants for the appointment of a receiver to take charge of the property included in said decree. Upon the return day of the summons issued upon said petition, to-wit: seventeen days after the entry of said judgment and decree, the regular judge of said court, by reason of his interest aforesaid, appointed a member of the bar of said court to hear the proceedings upon said petition. The petition set up the judgment and decree above mentioned, and alleged that the property was not of suf-

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ficient value by the sum of \$500.00 to discharge said decree; that John W. Harris was insolvent; that appellants owned the property as tenants by entirety, but did not occupy the same; that insurance on the building would soon expire; that appellee had been and would be required to pay the taxes upon said property, and that its rental value was from \$8.00 to \$12.00 per month. The prayer asked that a receiver "apply the income, rents and profits from said real estate as the court shall direct and as equity demands."

By way of answer in abatement, the appellants pleaded the said first appointment of a special judge in the original suit; that he had presided as above stated, and that his appointment had never been revoked or set aside, and that he had not declined to act further, but that no effort had been made to procure his further attendance; that they had objected to the appointment of said second special judge, and that, by reason of said facts, he was not authorized to preside in the hearing of said petition.

To this answer the court sustained the appellee's demurrer, and thereupon the appellants offered to consent to the appointment of a receiver upon the condition that the net proceeds of the rentals, after paying costs of receivership, taxes, insurance and maintenance of property, be paid to them. This offer was declined by the appellee, and the appellant, John W. Harris, answered further, admitting the allegations of the petition, alleging facts disclosing that he was a resident householder of the State and entitled to exempt property from execution; that he had only his interest in the real estate in question and the rentals thereof, and he claimed said rentals as exempt from execution and denied the right to a receiver therefor. To this answer the court sustained the appellee's de-

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murrer. The appellant, John W. Harris, declined to plead further. Lottie B. Harris answered further in general denial, and upon a hearing by the court a receiver was appointed. At this point in the proceedings the appellants moved the court to order said receiver to distribute the net proceeds, after paying costs, etc., to them, which motion was overruled, and the court thereupon ordered the receiver to preserve the property, pay taxes and insurance and to abide the further order of the court.

The sufficiency of the petition, the jurisdiction of said second special judge and the right of John W. Harris to an exemption of said rentals are the questions argued in this court.

The court, through its regular judge, notwithstanding the change of venue or change from such regular judge, possessed jurisdiction to name the special judge who should hear and determine the cause, or any part thereof undisposed of. *Stinson v. State, ex rel.*, 32 Ind. 124; *Glenn v. State*, 46 Ind. 368; *Hutts v. Hutts*, 51 Ind. 581.

The proceeding for the appointment of a receiver was auxiliary to the original case, and properly followed the final judgment and decree. *Chicago, etc., R. W. Co. v. St Clair*, 144 Ind. 371.

The first special judge, during his sitting, was not required by any issue then formed to pass upon the question of appointing a receiver. The petition for such receiver, although in aid of the decree originally rendered, was a new invocation of the equity powers of the court, and was an appeal to the court, rather than to its judge or to the special judge who presided in the original suit. The right to put that jurisdiction into exercise did not depend upon the will or pleasure of the special judge, but rested with the court whose regular judge was disqualified from acting, all but to

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appoint a special judge. The first special judge reached a definite conclusion and exercised the jurisdiction he was called upon to entertain. The application for a receiver was as distinct from the original proceeding, in calling for the action of the regular judge in selecting a judge to hear it, as if the original proceeding had been purely legal instead of equitable and the new proceeding had required the exercise of another jurisdiction. We have no doubt that the special judge so appointed to hear the application for a receiver had jurisdiction, and that the demurrer to the plea in abatement was properly sustained.

We think there can be no question of the sufficiency of the petition to support the appointment of a receiver. From its allegations it appeared that the property was inadequate to secure the debt; that the debtor was insolvent; that the mortgagors did not occupy the property; that the security was in peril from the lapse of insurance and the maturity of taxes. This is sufficient. Section 1236, Burns' R. S. 1894 (1222 R. S. 1881); *Favorite, Rec.*, v. *Deardorff*, 84 Ind. 555; *Connelly v. Dickson*, 76 Ind. 440; *Storm v. Ermantrout*, 89 Ind. 214; *Main v. Ginthert*, 92 Ind. 180; *Hursh v. Hursh*, 99 Ind. 500; *Merritt v. Gibson*, 129 Ind. 155.

That the appellants, or either of them, may have been entitled to an exemption cannot be considered with reference to the sufficiency of the petition, as no facts appear therein from which the privilege will be deemed to have been claimed by them. The answer setting up the claim of the appellant, John W. Harris, to an exemption and his duty to interpose the claim in the proceeding for the appointment of a receiver are sought to be maintained upon the authority of *Storm v. Ermantrout*, *supra*. There the petition raised affirmatively the issue, and upon it the court adjudged that the rentals were subject to the payment of the mort-

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gage debt. It was held that the debtor could not, in the face of that adjudication, obtain another hearing as to the liability of the rentals so to pay the debt. The inference from the language of the learned judge who wrote that opinion is, that if the question had not been put at rest by the adjudication, the right to an exemption, if such right existed, might thereafter be asserted. Here the petition sought no such decision, and the order, as we have shown, included only the direction to apply rentals to insurance and taxes and to retain the balance subject to the future order of the court. That this was a proper order is conceded upon the theory of the offer of the appellants to permit a receiver to be appointed and upon the discussion of their counsel in this court with reference to that offer. At any rate, the order did not preclude the appellants upon the question of an exemption, but left that question open for disposition upon the distribution of the fund, if any shall remain. As to whether the right of exemption exists in favor of John W. Harris, we offer no opinion.

We find no error in the judgment of the circuit court, and the same is affirmed.

 STALCUP v. THE STATE.

[No. 17,865. Filed November 24, 1896.]

146	270
157	240
146	270
162	182

CRIMINAL LAW.—*Appeal*.—Where in a criminal case the record clearly discloses that a fair and impartial trial has been had, the court will disregard errors which have not prejudiced the substantial rights of the defendant, but on the other hand, where it does not appear clearly from the evidence that the defendant was guilty, the court must scrutinize carefully the errors complained of to determine whether they are of such a character that defendant may have suffered from them.

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PRACTICE.—Criminal Law.—Evidence.—Cross-Examination of Defendant.—The defendant in a criminal case, who becomes a witness in his own behalf may be asked on cross-examination if a certain occurrence, not connected with the crime charged, did not take place ; but the State is bound by his answer, and cannot impeach him upon such collateral matter.

EVIDENCE.—Criminal Law.—General Reputation of Defendant.—The reputation of a defendant in a criminal prosecution, for peace and quiet, can be shown only by proof of his general reputation in that respect, and not by proof of particular acts.

SAME.—Homicide.—Evidence.—Reputation of Deceased.—The general reputation of the deceased for peace and quiet cannot be shown in a murder trial by testimony as to a particular instance of good conduct.

From the Marion Criminal Court. *Reversed.*

Willard Robertson, for appellant.

W. A. Ketcham, Attorney-General, and *F. E. Matson*, for State.

HOWARD, J.—The appellant was convicted of murder in the second degree and sentenced to imprisonment in the State's prison during life for the killing of George Owens.

It is assigned as error on this appeal that the court overruled appellant's motion for a new trial.

The quarrel which resulted in the death of George Owens occurred on May 13, 1895, in a drinking place, known as Power's barrel house, on East Washington street, in the city of Indianapolis. Both parties were colored persons. Excepting appellant himself, the only witness who testified to the circumstances leading up to and immediately following the fatal blow, was the barkeeper, John R. Merl. His testimony shows that at a little before 11 o'clock in the evening, Owens came into the place with a white man. It could be seen that both had been drinking. Owens stood with his back to the bar, not far from the screen, his left elbow resting on the bar. The appellant was then standing near the stove, about nine feet from Owens.

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Owens did not say anything at first, but in a short time raised his head and looked over at the appellant, asking, in very gross language, why appellant was always bothering him. Appellant replied that he was not bothering him. With that both men seemed to move towards one another. Owens afterwards falling back to the bar, but a little farther down towards appellant. Appellant then also stopped, standing about two or three feet from Owens. Owens was at this time, as the witness says, standing "away from the bar and using the bar as a brace, leaning back." The witness continues: "While leaning back in that shape—he came in once before with a knife in his hand—I could see the blade of the knife in the palm of his hand, about that position (indicating), like that, and standing about like that (indicating). * * * Dave [appellant] had stopped walking, I think." At this time the deceased said: "Oh, damn you, and your family and your sisters." Appellant replied: "Don't you damn me and my sisters, don't you damn me and my family and sisters," calling him also a vile name. The barkeeper then saw that there was to be trouble and started around the screen to part them. His evidence continues: "When I got around there they had parted, just as I got around there. It looked like Mr. Owens braced himself that way and struck Dave that way, and in striking out fell over towards the barrels." "Did he miss Dave or hit him?" "Missed him." "That is the only strike you saw him make at Dave?" "I think it was, unless he struck the same time Dave did." The barkeeper then parted them, Dave, the appellant, going out on the street; and Owens also starting out, when apparently realizing that he had been hurt, he said, "I am cut." As appellant was going out the barkeeper had said to him, "Did you cut him, Dave?" but appellant made no answer.

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Appellant's own evidence as to the quarrel is that he was near the stove when Owens came in and stood leaning at the bar, and then continues: "He began to monkey with me, picking at me. I asked him to go away. I told him that he was full, and I did not care about fooling with him. He was drunk. After he found I would not fool with him, he got mad and cursed me, and he said: 'Damn you, you little black son of a b—h, I will cut your damned head off,' spoke that way. I did not know whether he meant it or not. I said to him: 'Maybe you will, you are big enough to do it.' Just that way. He said: 'Yes, damn you, I will do it.' I said, 'Well, I do not know;' so he gets back against the bar, and says to me: 'Damn you, and your mother and sisters, and the whole family of you.' I stepped out, I said: 'George, don't damn me and my family, my mother and sisters, they are not bothering you.' Just that way. He said: 'I will cut your damn head off.' He said that. When he said that I stepped back towards him from the stove, and said: 'Don't curse me and my mother and sisters.' They were not bothering him. He said: 'I will cut your damned head off.' He was leaning on the bar on his elbow, he had a knife in his hand, I saw the knife. I stepped back after he straightened up from the bar. I stepped back and he made two or three steps towards me with the knife in his hand. I saw he had the knife and I ran my hand in my pocket and pulled my knife out and opened it. He kept cursing me and coming towards me with the knife; he came three or four steps towards me. I saw he was going to cut me. He raised the knife and stepped back, and I got my knife open and he rushed on, and I stuck my knife at him, that way (indicating). He kept coming towards me. After I stuck my knife at him I did not know I had cut him

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until he rushed up by the door and stopped very sudden and fell down. When he got up his knife fell. He said, 'I am cut.' He gets back against the bar with the knife in his hand. By that time Johnny Merl [the bartender] came around from behind the screen." Certain statements made by appellant to the officers at and after his arrest were also given in evidence.

The two men were acquainted, but do not seem to have had any relations, either friendly or unfriendly, with each other, except that they had, during that day, a little scuffle. Appellant was a laborer and his reputation, previous to this, is not called in question. The deceased was much larger and stronger than appellant. He was abusive and quarrelsome when in drink, but otherwise apparently good natured. He had been sentenced to the workhouse for assault and battery. He had been in the barrel house twice before, during the evening of the fatal accident, once about half past six and once about nine o'clock. He was under the influence of liquor each time, and acted in an abusive manner.

Fred Baum testified that he saw Owens in the bar-room about half past six. "He came in there," says this witness, "and commenced to raise a disturbance right away. * * * He stepped up to the bar and asked for a drink, and the barkeeper refused him, would not give it to him, and the bartender told him to get out; and he did not do it right away, and the bartender called to Mr. Davis, and Mr. Davis came down the back way, and he turned around and dropped his knife. * * * I saw it, he picked it up and went out, and he was about half way in the bar-room, and turned around his head and said, 'I will go and kill that Dutch son of a b—h,' " referring to the bartender.

Appellant testified that he witnessed the quarrel

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with the bartender, and saw Owens drop his knife as he went out, and pick it up again. The bartender, Merl, also testified that on the second occasion when Owens came in, appellant was shaking dice at the bar. when he, Merl, said: "That fellow [meaning Owens] acts as though he was looking for trouble." Appellant testified further that he had heard that Owens was a dangerous man when drinking, and had also heard that Owens had been in the workhouse for assault and battery.

The testimony in the record discloses a case that makes it necessary to scrutinize carefully the errors of which appellant complains to determine whether they are of such a character that appellant may have suffered from them. In cases where it is manifest that a fair and impartial trial has been had, and that the judgment is just on the merits, the court, as required also by the statute, will disregard errors which have not prejudiced the substantial rights of the defendant, and will suffer the judgment to stand. Section 1964, Burns' R. S. 1894 (1891, R. S. 1881). This, however, is not such a case. See *Hutchins v. State*, 140 Ind. 78, 16 Crim. Law Mag. and Rep. 435.

Spencer Brown, a witness called by the State in rebuttal, was asked whether, "on a certain evening in the spring of the year, while David Stalcup was behind the soup counter in Powers' barrel house of this city, if some one did not call David Stalcup a son of a b—h, and he tried to get over or around the counter at him, and you and others interfered?" The appellant, on his cross-examination, had been asked the same question by the State, and had denied that any such occurrence had taken place. It was, perhaps, proper to have asked the question of appellant, on his cross-examination. He had presented himself as a witness in his own behalf, and, subject to the discre-

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tion of the court, might undoubtedly be subject to the same tests applied to the testimony of other witnesses. *Parker v. State*, 136 Ind. 284. This, however, was the limit to which such collateral inquiry could go. The State was bound by the negative answer of the appellant, and could not seek to impeach him in a matter not relating to the charges made against him in the trial and against which he was then defending himself. Neither was the question put to the witness Brown proper as tending to show the reputation of appellant for peace and quiet. This could be shown only by proof of appellant's general reputation, not by proof of particular acts. *Drew v. State*, 124 Ind. 9; *Griffith v. State*, 140 Ind. 163.

Counsel for State practically admit that this was error, but endeavor to show that the error was harmless. We are of opinion that, considering the state of the evidence before the jury, we cannot say that the error was harmless. There were but two witnesses to the fatal quarrel. Indeed, there was but one witness to the actual encounter, appellant himself. The error complained of allowed the jury to conclude that in an immaterial matter, one not directly concerning the charge against him, the appellant had testified falsely; and they might well, therefore, form the opinion that in an account given by him of the encounter with Owens, in which his liberty, if not his life, was involved, he would be still less likely to speak the truth. And if the jury put no credence in the story told on the trial by appellant, it may well be that they gave little heed to his plea of self-defense, or might find malice where none existed, and so find him guilty of murder in the second degree, instead of manslaughter.

A like error was committed in permitting the State to ask one of its witnesses, Aaron King, as to a certain

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praiseworthy action of the deceased. The general reputation of the deceased for peace and quiet could not thus be shown by testimony as to a particular instance of good conduct. This, too, under the circumstances, we are not able to say was harmless error; for if the jury were thus impressed with the belief that the deceased was of a gentle disposition, they might look upon the act of appellant, in taking his life, as the more inexcusable.

Complaint is also made of the giving, and also of the refusal to give certain instructions. It would seem that this was a case in which the court should, perhaps, have more carefully charged the jury as to the element of malice and the distinction between murder and manslaughter. No good purpose, however, would be served by further considering alleged errors which may not be repeated on the next trial, even if they occurred on this, as claimed by counsel.

The judgment is reversed, with instructions to grant a new trial.

CRIST ET AL. v. SCHANK ET AL.

[No. 17,906. Filed November 24, 1896.]

WILLS.—Construction.—Active Trust.—Testator devised real estate to his wife in trust, that in the event C. marries and has issue and the wife thought it advisable, she might convey the real estate to such "issue or children," and in case no such conveyance was made the real estate was to go at the wife's death to a certain township for school purposes. *Held*, That the trust created by the will was in the nature of an active one, that the interest of C.'s children was dependent upon the action of the wife in conveying same to them, and that by conveyance to one of C.'s children, the other children acquired no interest therein.

From the Perry Circuit Court. *Affirmed*.

J. T. Patrick, O. C. Minor and E. C. Henning, for appellants.

C. A. Weathers and Leach & Odle, for appellees.

JORDAN, C. J.—Appellants, John M. Crist and Maggie Norton, instituted this action to recover possession of the east half of the southwest quarter, and the southeast quarter of the northwest quarter of section six, town seven, range one west, situated in Perry county, Indiana. They alleged, among other things, in their complaint, that they were the owners in fee-simple and entitled to the possession of an undivided two-thirds of said lands; that the defendant, Schank, held possession of the real estate, and for nineteen years had unlawfully kept them out of possession, and they demanded judgment for possession and \$2,000.00 damages, etc.

Upon a trial by the court there was judgment in favor of the appellee. The appellants predicate their alleged error upon the action of the trial court in overruling their motion for a new trial which, in the main, was based upon the following reasons:

1st. That the decision was not sustained by the evidence.

2d. That the decision is contrary to law.

The evidence, as it appears in the record, establishes the following facts: John Riggs died in 1850, the owner of the real estate in dispute, leaving Polly Riggs as his widow. Previous to his death, in 1849, he executed his last will and testament, which after his death was duly probated. By this will, the testator, after giving certain moneys and incomes to his wife, Polly Riggs, and to Nancy Crist, sister of the latter, and after devising other personal property to the inhabitants of Congressional township seven, south of range one west, in Perry county, Indiana, for the use of the common school fund, etc., disposed of his real estate as follows:

“I do hereby give and bequeath the rents and profits of all my real estate to my said wife and Nancy Crist

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during their natural lives, share and share alike, and whichever may survive the other, then the survivor shall have the whole of such rents and profits to the day of her death. And I do hereby give and devise all of my said real estate to my said wife, to be held by her in trust for the following purposes, to-wit: In case James Crist marries and has issue, and my said wife may think it advisable so to do, she may convey, by deed or otherwise, all of my said real estate to such issue or children of the said James Crist, and in case no such conveyance is made by my said wife to such children or issue of the said James Crist, I do give and devise all my said real estate to the said Congressional township seven, south of range one, west, to be used and managed by said township the same as other school lands," etc.

After the death of the testator, James Crist, who was a nephew of the wife of the testator, married, and the following children were the fruits of said marriage, namely: Benjamin F. Crist, born June 28, 1852; John M. Crist, born October 22, 1853; Maggie Norton, *nee* Crist, born October 2, 1857, the last two being the appellants in this appeal.

On August 3, 1852, Polly Riggs, the surviving wife, executed a deed conveying the land in question to Benjamin F. Crist, the infant son of John Crist. She recited in said deed of conveyance that she was the widow of John Riggs, deceased, and that by virtue of the trust to her granted by the last will of her said husband, and for the love she bore to Benjamin F. Crist, son of James and Elizabeth Crist, and for the further consideration of \$5.00 to her paid, that she did "hereby bargain, barter, sell and convey to Benjamin F. Crist, son and only issue of James and Elizabeth Crist," the following real estate, describing it, being the same now in controversy. The deed also recited the probate

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of the will, giving the record, etc., and stated that Nancy Crist and the grantor had a life estate in said lands, and after their death the conveyance was to operate as a "fee-simple conveyance" of the land to Benjamin F. Crist, his heirs and assigns forever, etc. Nancy Crist, one of the life-tenants, died in 1864, and Polly Riggs, the other life-tenant, died in 1865. James Crist, the father of Benjamin F. Crist, with his family moved onto this land in 1865, after the death of Polly Riggs. James Crist died soon thereafter, and Benjamin F. Crist, together with his mother and the other two children, John M. and Maggie Crist, continued to reside on this land until 1875. On January 15, 1875, Benjamin F. Crist sold and conveyed this land to the appellee for the sum of \$2,000.00, and the latter, under this deed, went into possession thereof in January, 1875. There is evidence that the appellants made no claim to the land until about one year before the commencement of this action, this, however, is disputed by the evidence given by them in their own behalf.

It is insisted by their counsel that under the provision of the will of John Riggs, heretofore set out, two estates were created, namely, a life estate in Polly Riggs and Nancy Crist and a contingent remainder to the children of James Crist in the event he married and had issue; said remainder, they say, being held in trust by the life tenant, Polly Riggs.

Clearly, this contention of the appellants, under the evidence, cannot be sustained. We have seen, by the provisions of the will in dispute, that the testator devised all of his real estate to his wife, Polly Riggs, to be held in trust by her, and in the event James Crist married and had "issue," and the wife thought it advisable to do so, then it provided that "she may convey by deed or otherwise all of my real estate to such issue or children." It further provided that in case

no such conveyance was made by the wife, then the land was to go to the Congressional township. Manifestly, the will did not operate to pass any title directly to the "issue or children" of James Crist, but their taking title depended upon the action of Mrs. Riggs in conveying the same to them by deed as provided by the will. In the absence of such a conveyance by her, it appears to have been the intention and desire of the testator that his lands, after the death of the two life tenants, should go to the township mentioned. At the time Mrs. Riggs executed the deed to Benjamin F. Crist, appellee's grantor, the appellants were not in being, hence it cannot be said that they took any title under this conveyance. If it can be urged that the conveyance of the land by Polly Riggs to Benjamin F. Crist alone, who was the only child at that time of James Crist, was not within the meaning of the will, and therefore did not vest the title in him, then it would not follow, as a sequence that the title to the land in controversy was vested in appellants. For, in the absence of the act of conveyance by the trustee, it was to go to the township. The trust created by the will is, apparently, in the nature of an active one, as it, at least, required the agency of the trustee to execute it. See *Locke v. Barbour*, 62 Ind. 577; *McCoy v. Monte*, 90 Ind. 441.

Upon any view of the question, it is evident that there is an entire lack of title in appellants. They were required, under section 1069, Burns' R. S. 1894 (1057, R. S. 1881), to recover upon the strength of their own title, and the burden was cast upon them to show title in themselves, before they could recover against the appellee in possession, even if it could be conceded that the latter had no title to the premises.

The judgment is a correct result under the facts in the case, and is therefore affirmed.

Olerick *et al.* v. Ross *et al.*

OLERICK ET AL. v. ROSS ET AL.

[No. 17,929. Filed November 24, 1896.]

WILLS.—Execution.—Attestation.—Statute Construed.—Under section 2746, Burns' R. S. 1894, providing as to the form of execution and attestation of wills, it is not essential to the validity of a will that the attesting clause should recite all the forms required by the statute; it is sufficient if the witnesses subscribe their names as such opposite the word "witnesses."

From the Lake Circuit Court. *Affirmed.*

Thomas J. Wood, for appellants.

Bruce & Bruce, for appellees.

MONKS, J.—This action was brought by appellants against appellees, to quiet title to certain real estate in Lake county. Appellees claim title to said real estate under the will of William Hoofhouse, which was probated August 7, 1888. Appellants contend that said will is void, and claim title to the real estate as the heirs of said testator.

It is insisted that the will is void because it is not attested as required by statute; that the attesting clause should be in writing, and recite all the forms required by the statute, and thus show the same had been complied with.

Section 2746, Burns' R. S. 1894 (2576, R. S. 1881), provides that "No will except a nuncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses."

The testator signed the will by mark, and the only attesting clause was the word "Witnesses," opposite which the names of the witnesses were subscribed.

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While it is very desirable, for reasons not necessary to state in the determination of this cause, that an attestation clause should be full and give all the details required by the statute, yet this is not essential to the validity of the will. In order to probate a will it is necessary to prove by proper evidence that all the requirements of section 2746 (2576), *supra*, were complied with, but said section does not require an attesting clause showing that said legal formalities were all observed.

It is sufficient if the witnesses subscribe their names as witnesses under or opposite the word "witness" or "attest," or other words of like meaning, or subscribe their names without any expression whatever. *Herbert v. Berrier*, 81 Ind. 1; *Potts v. Felton*, 70 Ind. 166; *Ela v. Edwards*, 16 Gray (Mass.) 91, 90 Am. Dec. 174; *Fatheree v. Lawrence*, 33 Miss. 585; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690, 16 Am. St. 706; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. 265; *Christopher Fry's Will*, 2 R. I. 88; *Chaffee v. Baptist Miss. Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *Jackson v. Christman*, 4 Wend. 277; *Jackson v. Jackson*, 39 N. Y. 153; *Roberts v. Phillips*, 4 El. & Bl. 450; *Bryan v. White*, 5 E. L. & Eq. 579; *Croft v. Pawlett*, 2 Stra. 1109; *Brice v. Smith*, Willes 1; 29 Am. and Eng. Ency. of Law, 194, 198, 203, and notes; 1 Jarman on Wills (5th ed.), 85; Schouler on Wills (2d ed.), section 346, and notes 5 and 6.

In *Potts v. Felton*, *supra*, the word "attest," written opposite the signatures of the witnesses was the only attesting clause and the will was sustained.

The statute of Massachusetts concerning the execution of wills, as set out in *Ela v. Edwards*, *supra*, is the same as section 2746 (2576), *supra*, except as to the number of witnesses required. In that case the court said: "The single requirement of the statute is that

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the instrument be attested and subscribed in the presence of the testator by three or more witnesses. Even this, though it be essential that the facts be established by the evidence, yet neither the statute nor the decisions of the courts require that it be recited in the form of an attesting clause. * * * It seems, therefore, to be well established that the fact of the want of an attesting clause does not invalidate the will."

In *Fatheree v. Lawrence, supra*, the court held that although the statute expressly required that the attestation should be in the presence of the testator, that fact need not necessarily be stated in the attestation, and that it would be sufficient if that fact was proved at the trial.

In *Roberts v. Phillips, supra*, the court said: "The first objection taken to the attestation of William Bevan was that nothing appears on the face of the will to designate him as a witness. * * * It never has been held that a testimonium clause is necessary under this statute, or that the witnesses should be described as witnesses on the face of the will. Nothing more is required than that the will should be attested by witnesses, i. e. that they should be present as witnesses, and see it signed by the testator, and that it should be signed by the witnesses in the presence of the testator, i. e. that they should subscribe their names upon the will in his presence."

It follows that the will in controversy was properly attested within the meaning of section 2746 (2576), *supra*, and was not therefore invalid.

Judgment affirmed.

Gray et ux. v. Oughton.

GRAY ET UX. v. OUGHTON.

[No. 17,948. Filed November 24, 1896.]

146	285
159	77
146	285
161	462
146	285
168	628

RECEIVERS.—*Interlocutory Order.*—*Sufficiency of Complaint.*—On an appeal from an interlocutory order appointing a receiver, the insufficiency of the complaint cannot be urged, as the complaint in all respects is still pending in the trial court subject to amendment.

SAME.—*Appointment Of.*—Where a receiver is appointed in open court in the presence of the parties in interest without objection or exception, the legality of such appointment cannot afterwards be raised by a motion to set it aside, nor by a motion for a new trial.

From the Pulaski Circuit Court. *Affirmed.*

McConnell & Jenkins and *Borders & Borders*, for appellants.

Steis & Hathaway and *M. Winfield*, for appellee.

MCCABE, J.—This is an appeal from an interlocutory order of the Pulaski Circuit Court, appointing a receiver “to take charge of the rents and profits of (certain) described real estate,” situate in Pulaski county.

A large body of land is shown by the complaint to have formerly belonged to appellant, Thomas Gray; that he and his co-appellant, Jennie A. Gray, his wife, had conveyed said lands to one Judd, and that Judd had conveyed them to appellee; that afterwards Jennie A. Gray was duly appointed guardian of said Thomas for unsoundness of mind; that afterwards, in a suit between appellee and said Grays in the Pulaski Circuit Court, his title to all of said land so conveyed was by the Pulaski Circuit Court duly quieted in appellee; that after the entry of said decree said Grays had stealthily taken possession of 400 acres of said

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land, and were by force and by the assistance of numerous other people keeping appellee out of possession by force; that the Grays were totally insolvent. The final relief sought was a writ of assistance. What there was to assist by such a writ we are unable to perceive just at this time. The decree quieting title subsists in all its force without regard to the question of possession.

One of the errors assigned is the insufficiency of the complaint, and another is the overruling of a demurrer thereto.

But the complaint remains in the trial court, and is there subject to amendment so long as the case is still pending in that court. It seems well settled in this court that on an appeal from an interlocutory order appointing a receiver, the sufficiency of the facts stated in the complaint to constitute a cause of action cannot be urged, as the complaint in all respects is still pending in the trial court subject to amendment, and may, on such application, be supplemented and enlarged by affidavit and oral proofs.

The nature of the facts on which the appointment is sought in this case are of such a character as, if perfectly stated, they would make a case for the appointment of a receiver.

The insufficiency of the complaint, or overruling a demurrer thereto for want of sufficient facts, cannot prevail on this appeal from the interlocutory order. *Bufkin v. Boyce*, 104 Ind. 53; *Shoemaker v. Smith*, 100 Ind. 40; *Supreme Sitting, etc., v. Baker*, 134 Ind. 293.

Overruling a motion for a new trial is another one of the alleged errors assigned. There can be no motion for a new trial in such a case, because there has been no trial. *Shoemaker v. Smith*, 74 Ind. 71.

The only other assignment of error is that the cir-

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cuit court erred in overruling appellants' motion to set aside the appointment.

The receiver had been appointed in open court, in presence of appellants without objection or exception. They afterwards seek to raise the legality of the appointment by a motion to set it aside.

In *Lime City Building, etc., Assn. v. Black*, 136 Ind. 544, it was held by this court, that a party who did not except to such an appointment is not in a position afterwards to complain of the same.

And so here, the time to object to the appointment of a receiver was before the appointment was made, and when the appointment was made the objection should have been made available by an exception thereto.

We find no available error in the record. The interlocutory order is affirmed.

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[No. 17,968. Filed November 24, 1896.]

ATTORNEY AND CLIENT.—*Negligence of Attorney*.—No mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground of relief unless it would have been excusable if attributable to the client.

FORMER ADJUDICATION.—*Motion to Vacate Judgment*.—Where at the same term of court at which a judgment by default was taken, a motion made to set aside such default is heard and overruled, the overruling of such motion is a final judgment and is a bar to another proceeding for the same purpose.

From the Boone Circuit Court. *Reversed*.

Ira M. Sharp, for appellant.

Terhune & New, for appellee.

MONKS, J.—This action was brought by appellee in

146 287
156 570

146 287
160 96

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the court below under section 396, R. S. 1881 (399, Burns' R. S. 1894), to set aside a default and judgment of said court quieting appellant's title to certain real estate.

That part of the complaint which it is claimed sets out "the facts which show that the judgment was taken against appellee through his mistake, inadvertence, surprise or excusable neglect," is substantially as follows: "The original action to quiet title was commenced by appellant in the Boone Circuit Court on December 30, 1892, against appellee and others, including one Richard M. Crouch; that summons was served on appellee ten days before the return day thereof by copy; that said Richard M. Crouch, as the agent of appellee, employed the firm of Wesner & Wesner, practicing attorneys, to appear for appellee and make his defense to said action; that said attorneys accepted said employment and agreed to look after appellee's interest in said action and notify him when he should be needed; that said Wesner & Wesner entered their appearance generally for the defendants; that afterwards, one Patrick H. Dutch, a practicing attorney of said court, announced in open court that he appeared for Matilda Horner, one of the defendants in said cause; that C. S. Wesner, a "member of said firm of Wesner & Wesner, was present in court and heard said announcement, and understood and believed that said appearance was for appellee, and by reason of said misunderstanding he did not thereafter appear for appellee, but appeared for O. D. Wesner and Crouch and wife, who were also defendants in said cause; that afterwards a rule of court was taken against the defendants to answer, but because of said misunderstanding no one appeared for appellee and no answer was filed for him, and on the 22d day of January, 1893, a default was taken against appellee

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without his knowledge or consent, and without his knowing that Wesner & Wesner were not appearing for him, and without Wesner & Wesner knowing that Dutch was not appearing for appellee; and afterwards, on February 4, 1893, appellant recovered judgment on said default, quieting his title to said lands."

It is earnestly insisted by appellant "that the facts stated in the complaint do not show that judgment was taken against appellee through his mistake, inadvertence, surprise or excusable neglect, but that the facts alleged show that the same was taken on account of the negligence of his attorneys, and that their negligence is attributable to him."

It is clear that the facts alleged show that the default was taken and judgment rendered against appellee on account of the negligence of his attorneys.

When C. S. Wesner, his attorney, understood from the announcement made by Mr. Dutch, that he appeared for appellee, proper diligence required that he make some inquiry of Dutch in regard to the same, and that he examine the files in the case. This he never did. He knew that Matilda Horner was a co-defendant in said cause with the appellee, Truman Horner. An examination of the issue docket, order-book entry or the answers filed would have disclosed his mistake. His failure to make such inquiry and examination was gross negligence.

It is a general rule that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground of relief unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client. *Indianapolis, etc., R. W. Co. v. Hood*, 130 Ind. 594,; *Sharp v. Moffitt*, 94 Ind. 240; *Kreite v. Kreite*, 93 Ind. 583; *Brumbaugh v. Stockman*, 83

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Ind. 583; *Cox v. Harvey*, 53 Ind. 174; *Phelps v. Osgood*, 34 Ind. 150; *Frazier v. Williams*, 18 Ind. 416; *Spaulding v. Thompson*, 12 Ind. 477; *Heaton v. Peterson*, 6 Ind. App. 1; 2 Elliott's Gen. Pract., section 1032, and cases cited in note 2.

It follows, therefore, that the facts stated in the complaint did not entitle appellee to any relief under the provisions of section 396 (399), *supra*.

It appears, from the evidence given in this case, that at the January term, 1893, of said court, the same term at which said judgment was rendered, that appellee filed his written motion to set aside the default and judgment in said cause. That he afterwards filed an amended motion to set aside said default and judgment, which motion was supported by the affidavits of himself, Wesner and Crouch. The affidavit of Wesner in support of said motion being the same as the one given in evidence by appellee in this proceeding. To which motion as amended, appellant filed a counter-affidavit as to the excuse or mistake averred in said motion for allowing said default to be taken. That afterwards, at the March term of said court, said motion was overruled, to which appellee excepted. When the court overruled said motion, that was a final judgment in said proceeding, and the presumption is that the same was determined upon its merits, unless the contrary is shown. 1 Van Fleet's Former Adjudication, sections 15, 16, 17, 18, 19, 20 and 21, and cases cited.

The grounds for setting aside said default and judgment alleged in said motion, filed by appellee in 1893, were the same as those contained in the complaint in this proceeding, except that appellee's defense to the original action is more specifically stated in the complaint in this case than in said motion. It is not es-

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sential, under our practice, that a motion to set aside a default under section 396 (399), *supra*, be verified.

It is settled law that whenever a matter is adjudicated and finally determined by a competent tribunal it is considered forever at rest. This principle not only embraces what was actually determined, but extends to every other matter which the parties might have litigated in the case. *Parker v. Obenchain*, 140 Ind. 211; *Wilson v. Buell*, 117 Ind. 315, and authorities cited.

We think the action of the court in overruling said motion made in 1893 to set aside the default and judgment in the original cause was an absolute bar to another proceeding for the same purpose. *White v. Watts*, 18 Ia. 74; *Kabe v. The Vessel "Eagle,"* 25 Wis. 108; *Mabry v. Henry*, 83 N. C. 298; *Himes v. Kiehl*, 154 Pa. St. 190, 25 Atl. 632; *Zadek v. Dixon* (Tex.), 3 S. W. 247; *Walker, Admr., v. Heller*, 104 Ind. 327; *Stults, Admr., v. Forst*, 135 Ind. 297; *Parker v. Obenchain, supra*; *Davis v. Bass*, 4 Ind. 313; *Hawk v. Evans*, 76 Ia. 593, 41 N. W. 368; *Wilson v. Craige*, 113 N. C. 463, 18 S. E. 715; *State v. Evans*, 74 N. C. 324; *Moore v. Garner*, 109 N. C. 157, 13 S. E. 768; *Sanderson v. Daily*, 83 N. C. 67; *Phillips v. Queen*, (Ky.), 3 S. W. 146; *Nat'l Bank v. Hansee*, 15 Abb. N. C. 488; *Johnson v. Latta*, 84 Mo. 139; *Armstrong Co. v. Plum Creek Tp.*, 158 Pa. St. 92, 27 Atl. 842; *Gallaher v. City of Moundsville*, 34 W. Va. 730, 26 Am. St. 942, 12 S. E. 859; *N. Y. & N. J. Telp. Co. v. Metropolitan Telp. & Telg. Co.*, 81 Hun. 453, 31 N. Y. Supp. 213; *Rogers v. Hoenig*, 46 Wis. 361, 1 N. W. 17; *Pignolet v. Geer*, 19 Abb. Pr. 264; *Kaufman v. Keenan*, 2 N. Y. Supp. 395; *Hill v. Hoover*, 9 Wis. 12; *Pierce v. Kneeland*, 9 Wis. 19; *Austin v. Walker*, 61 Ia. 158, 16 N. W. 65; *Mayer v. Wick*,

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15 Ohio St. 548; *Spitley v. Frost*, 15 Fed. 299; Van Fleet's Former Adjudication, sections 15, 16, 17, 18, 19, 20 and 21, and cases cited.

In 1 Van Fleet's Former Adjudication, at section 19, it is said: "An order denying a motion to set aside a judgment bars a new motion for the same purpose. So, the denial of a motion to set aside a judgment because obtained by irregular practice is a bar to a new one to set it aside because of a fraudulent advantage taken in entering it up, because the law does not tolerate successive proceedings to accomplish the same result upon newly assigned reasons. * * * An order overruling a motion to set aside a default precludes a suit for the same purpose."

Besides the default and judgment which it is sought by this proceeding to set aside were taken at the January term, 1893, of the Boone Circuit Court, the first motion to set aside said default was overruled April 29, 1893, and this proceeding for the same purpose was not commenced until July 19, 1894, more than seventeen months after the judgment was rendered in the original action. No excuse is shown for this delay. The record shows that appellee made his affidavit in the first proceeding to set aside said default on February 10, 1893, and knew then, if not before, that said default had been taken.

This court said in *Birch v. Frantz*, 77 Ind. 199, on page 203: "While it is true that the period of two years is allowed a party who seeks to set aside a judgment, in which to file his application, yet he is not excused from showing that he has acted promptly and diligently. After discovery of the default and judgment, a party who seeks relief must act with reasonable diligence. If he is unreasonably negligent in applying for relief he will obtain none."

This case is cited and the same doctrine declared in

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Ammerman v. State, 98 Ind. 165, where there was a delay of seventeen months in making the application to set aside the default.

For the reasons given the judgment is reversed.

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[No. 17,982. Filed November 24, 1896.]

ACTIONS.—Joinder of Causes.—Right to Jury Trial.—Statute Construed.—Under section 409, R. S. 1881 (412 Burns' R. S. 1894), which provides that "in case of the joinder of causes of action or defenses which prior to 1852 were of exclusive equitable jurisdiction with causes of action or defenses which prior to said date were designated as actions at law and that the former shall be triable by the court, and the latter by a jury, unless waived," etc., there may properly be joined causes or defenses, one of which is triable by the court and the other by a jury.

SAME.—Practice.—Equitable Jurisdiction.—Where equity takes jurisdiction of the essential features of a cause it will determine the whole controversy although there may be incidental questions of a legal nature.

SAME.—Equitable Defense.—Answers showing that all of the defendants except one were bankers and that between February, 1887, and January, 1891, they received from plaintiff and his agents, by way of deposits, large sums of money aggregating more than \$800,000.00, all of which they had paid out upon appellant's checks and that the deposits consisted of 600 items and the payments upon checks consisted of 800 items, do not present an equitable defense to an action for money had and received on the ground that the transaction was complex and multifarious in character.

ASSUMPSIT.—Sufficiency of Complaint.—Demand.—In assumpsit for money had and received, where the complaint alleges the receipt of money by defendant for the use and benefit of plaintiff, it need not allege a demand.

PRACTICE.—Correction of Ruling in the Formation of Issues.—Where a ruling upon the formation of the issues is wrong it may be corrected by the court, but it must be done at such time and in such manner as not to prejudice the rights of the pleader.

From the Lawrence Circuit Court. *Reversed.*

146	293
158	311
146	298
159	480
159	493
146	298
160	238
146	293
163	285
163	297
163	447
163	580
146	293
166	442
146	293
169	645

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Joseph Giles, W. H. Talbott, Zaring & Hottel, and Harvey Morris, for appellant.

William Ferrell, Alspaugh & Lawler, W. P. Rogers and Elliott & Elliott, for appellees.

HACKNEY, J.—The only question presented by the record is as to whether any of the issues joined in the lower court were triable by a jury. The suit was by the appellant in three paragraphs of complaint. The first sought a recovery for money had and received, and was in the ordinary form; the second sought an accounting and the recovery of the balance to be ascertained, and the third alleged fraud in certain stated settlements, sought to set aside such settlements, to obtain an accounting and to recover the amount to be ascertained in his favor. Appellant concedes, and correctly we have no doubt, that the second paragraph presented an issue of equitable cognizance prior to the 18th day of June, 1852.

The third paragraph was of like character, and would have invoked the same jurisdiction. The first paragraph, however, tendered an issue triable at law and not in chancery. This conclusion is conceded by the appellees. By the statute, Burns' R. S. 1894, section 412 (R. S. 1881, 409), it is provided that "Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction, with causes of action or defenses, which, prior to said date, were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived," etc. It is manifest, from the language of this

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statute, that there may properly be joined causes or defenses, one of which is triable by the court and the other by a jury. So it does not follow that because the second and third paragraphs of complaint presented causes triable only by the court, that the cause presented by the first paragraph was thereby "drawn into equity" and was triable only by the court.

The cases of *Evans v. Nealis*, 87 Ind. 262; *Carmichael v. Adams*, 91 Ind. 526; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Miller v. Evansville National Bank*, 99 Ind. 272; *Lake v. Lake*, 99 Ind. 339; *McBride v. Stradley*, 103 Ind. 465; *Towns v. Smith*, 115 Ind. 480, and *Monnett v. Turpie*, 132 Ind. 482 have been cited for the appellee in support of the contention that the primary features of the case presented by the complaint, as a whole, was of equitable cognizance, and that the entire case, therefore, became subject to equitable jurisdiction. There is no doubt, from those cases and others, that where equity takes jurisdiction of the essential features of a cause it will determine the whole controversy, though there may be incidental questions of a legal nature. The case of *Carmichael v. Adams*, *supra*, illustrates that rule. There, in a single paragraph of complaint the plaintiff sought to recover upon a note and to foreclose a mortgage securing it. It was held that the essential relief sought, the foreclosure of the mortgage, was of equitable cognizance and that the incidental question, that of ascertaining the amount due upon the note, passed within the equitable jurisdiction.

We have read carefully all of the cases cited, and none of them can be construed as holding that numerous causes of action stated in various paragraphs of complaint may not be severed and those of an equitable nature tried by the court, and those of a legal character tried by a jury. If the cases could be so con-

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strued they would certainly be in direct conflict with the statute cited.

It is insisted, however, that the issues as formed upon this paragraph of complaint, that is to say, those introduced by the answers, when considered in connection with said paragraph of complaint, become of equitable cognizance and triable by the court.

The answers were numerous, and included answers in denial, payment, set off, and former adjudication, all legal defenses; and it appeared from other answers that the appellees, other than Brown, were bankers, and that between February, 1887, and January, 1891, they received from the appellant and his agents, by way of deposits, large sums, aggregating more than \$300,000.00, all of which they had paid out upon appellant's checks; that the deposits consisted of six hundred items and the payments upon checks consisted of eight hundred items.

As to any of the last mentioned answers, it may well be doubted whether any one of them is more than an argumentative plea of payment or in denial of the allegations of the first paragraph of complaint. They present no affirmative issue and seek no affirmative relief.

The statute we have quoted very plainly recognizes the right to join legal and equitable causes of action, and also to join legal and equitable defenses. This right is one of the features of our code practice. While we have seen that legal and equitable causes may have been joined, though we should look to the answers to carry the questions arising upon the first paragraph of complaint into the class designated as equitable, we are not able to reach the conclusion that any equitable defense is pleaded in any of such answers.

The insistence of appellees' learned counsel is that

the answers last mentioned disclosed that the transactions for investigation were "long accounts," and from their complex and multifarious character subjected them to the jurisdiction of the chancellor.

To this proposition are cited a number of decisions, one a Wisconsin case, the decision in which is based upon section 2864, of the Revised Statutes of that state, authorizing a reference in matters involving complicated accounts. Others are New York cases, decided with reference to section 1013, of the code of that state, authorizing the submission of such accounts to a referee. Another is *Dubourg de St. Colombe v. U. S.*, 7 Peters, 625, where the trial judge, in an injunction suit, heard the evidence of the matters in question, and it was held that such matters should have been referred. From the nature of the suit it was of equitable cognizance regardless of the inquiry which the court held should have been referred.

Tiedeman's Eq. Jur., section 533, is also cited, but the author there discusses the growth of the old common-law action of *account render*, into the equitable suit for an accounting, by reason of the more satisfactory aids in the nature of discovery within the latter jurisdiction. He then shows that a suit for an accounting may be had as an equitable remedy, where the accounts are all on one side, and there are circumstances connected with the transaction which create great complications or difficulties in the way of a settlement at law; where there are mutual accounts and there is great difficulty of securing a satisfactory accounting, or where the monetary obligations arise between parties occupying a fiduciary relation.

Bispham's Principles of Equity, section 484, is cited by appellees. It is there said: "While the jurisdiction of courts of chancery in matters of account is limited by the considerations above stated, and perhaps

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by others, it is, nevertheless, difficult to draw the line with absolute precision. It may, however, be affirmed that in all cases in which an action of account would be a proper remedy at law, the jurisdiction of a court of equity is undoubted; and that this jurisdiction will extend, moreover, to all cases of mutual accounts, and also to cases in which the accounts are all on one side, but are very complicated and intricate, although such accounts would not be cognizable in the common-law action, as not existing between those parties by and against whom account render will lie. In short, the jurisdiction of the chancellor covers all cases for which account render would lie, besides many to which that action did not extend."

Some of the limitations referred to in the section quoted are stated in section 483 of that work: "It must not be supposed, however, that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted. Its jurisdiction is limited by certain restrictions. A court of equity cannot take cognizance of every action for goods, wares, or merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, in which different sums of money have become due, and different payments have been made. * * * Where the receipts or payments, or both, are all on one side, a bill for an account will not lie."

To clearly comprehend the meaning of the author, in these sections, we must look to the definitions of the phrases "bill for account" and "account render." They were formerly employed in the common-law practice to denote the procedure by which an accounting was secured, and as indicated by Tiedeman, *supra*, the frequent inadequacy of the remedy at law, or by jury

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trial, gave rise to the equitable remedy. But this did not carry into equity every proceeding to enforce the collection of an unliquidated demand consisting of several items. "The difficulty of drawing the line, with absolute precision," between those demands of an equitable and those of a legal nature has resulted in the more modern action of *assumpsit*, a legal remedy, and the suit for an accounting, an equitable remedy. Burrill's Law Dictionary, "Account," p. 22; Bouvier's Law Dictionary, "Account," p. 85; 2 Greenleaf on Ev., sections 34, 35; Bispham's Prin. of Eq., sections 479, 480, 481, 482; Ency. of Pleading and Practice, Vol. 1, pp. 84, 85.

In the latter it is said: "Account, sometimes called account render, was a form of action at common law against a person who, by reason of some fiduciary relation, was bound to render an account to another but refused to do so. In England the action early fell into disuse. And, as it is one of the most dilatory and expensive actions known to the law, and the parties are held to the ancient rules of pleading, and no discovery can be obtained, it never was adopted to a great extent in the United States. But the action of account was adopted in several states, principally because there were no courts of chancery in which a bill for an accounting lay." Pennsylvania, Connecticut and Illinois are cited as some of the states adopting the old practice.

It is by reason of these changes from the ancient to the modern rules of practice, as here illustrated, that the appellant's second and third paragraphs of complaint presented causes of equitable jurisdiction, and that his first paragraph presented a cause of legal jurisdiction. The former would, under the old practice, have been causes of common-law jurisdiction. The latter is now the action of *assumpsit*.

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It is claimed, however, that the latter paragraph is insufficient as a plea of assumpsit, as no demand is alleged. It is a plea of general assumpsit, where the law implies the promise of the defendant, and is not special, where an express promise must be alleged. See Ency. of Plead. and Pract., Vol. 2, p. 990. It alleges the receipt of money by the appellee to the use and benefit of the appellant, and in such cases the law implies the obligation to pay. It is known as a common count and is a common-law modification of the action of assumpsit. Phillips Code Pleading, section 369. While it is not perhaps consistent with the reformed rules of code pleading, in that it contains conclusions and rests upon the fiction of an implied promise, yet it has been recognized in this State as a proper pleading in which no allegation of a demand was necessary. *Spencer v. Morgan*, 5 Ind. 146; *Robinson v. Skipworth*, 23 Ind. 311; *Ferguson v. Dunn's Admr.*, 28 Ind. 58; *Spears v. Ward*, 48 Ind. 541; *Hennel v. Board, etc.*, 132 Ind. 32; 3 Works' Pract., p. 13. See also *Grannis v. Hooker*, 29 Wis. 65; *Bates v. Cobb*, 5 Bosw. 29; *Adams v. Holley*, 12 How. Pr. 326; *Betts v. Bache*, 14 Abb. Pr. R. 279; *Goelth v. White*, 35 Barb. 76.

The theory of the common count for money had and received by the defendant to the use of the plaintiff is, that where the money is had to the use of another and has not been applied there is no right to retain it, and the law implies the promise which corresponds with the duty. See *Brand & Co. v. Williams*, 29 Minn. 238, 13 N. W. 42; 2 Chitty Gen. Pract., section 899 (2d Am. ed.); *Knapp v. Hobbs*, 50 N. H. 476; *Eagle Bank v. Smith*, 5 Conn. 71.

The decision cited by appellant's learned counsel against the sufficiency of the first paragraph of complaint is *State, ex rel., v. Sims*, 76 Ind. 328, where the

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allegation was that the defendant was indebted "for money had and received of the plaintiff at his special instance and request," as shown by a bill of particulars annexed.

It was said: "It is not alleged in the complaint, that the money was had and received for the use of the appellant. If it were, no bill of particulars would be necessary. *Spears v. Ward*, 48 Ind. 541. The statement is, that the money was received from the appellant by the appellee at the special instance and request of the appellee. That, alone, would not create any indebtedness, and does not show a cause of action." The complaint was not of the character of that here in question, and the decision does not cover the point in controversy in this case. The objection to the pleading before us is not made upon an assignment of cross-error, but is urged upon the theory that, though the trial court may have erred in refusing a trial by jury, if the paragraph had stated a cause of action, the result was proper because of the insufficiency of the paragraph. As the basis for this proposition counsel rely upon the rule that intermediate errors will not reverse where the ultimate judgment is correct. There is no question about the rule, but it has this qualification: "If the wrong ruling asserts a definite and clearly marked theory, * * unless the record shows the contrary, and if that theory is wrong and probably works injury, there is error." Elliott's App. Proced., section 590. And if a ruling upon the formation of the issues is wrong, it may be corrected by the court, but it must be done at such time and in such manner as not to prejudice the rights of the pleader. Elliott's App. Proced., sections 695, 696, 697.

Treating the error as in the overruling a demurrer to the first paragraph of complaint, the theory asserted by the ruling was that the appellant might re-

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cover thereon without proof of demand. The subsequent action of the court in denying a jury trial, so far from correcting that error, would have been the most palpable deception and injustice to the appellant, who was entitled to amend, but was deprived of the right by a ruling having no apparent reference to his pleading. Treating the error as in refusing a jury trial, we do not perceive how that error was cured by the former erroneous ruling, and especially are we unable to discover how that method of curing the error would not result in injustice to the appellant, who was entitled to have the court follow the theory adopted in the formation of the issues, and if any change of theory were adopted, that it might be done without prejudice to his rights.

Neither the first paragraph of complaint nor any of the answers thereto seeks an accounting, and that great complications or difficulties are in the way of a settlement at law is assumed only from the allegation that numerous transactions had been involved in the dealings of the parties. Nor was there any intimation of a fiduciary relation between the parties.

We do not think, however, that the dividing line between causes or defenses of equitable and those of legal cognizance is to be ascertained by counting the items of account subject to inquiry. If an accounting is necessary or desirable, by reason of the complicated condition of the transactions in dispute, an appeal may be made to the equitable jurisdiction of our courts, either by complaint or cross-complaint, seeking such relief. But it has never, in this State, been deemed a cause for equitable relief that one may set forth an account of numerous items. As early as *Cummins v. White*, 4 Blackf. 356, it was held that "Equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutual-

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ity of dealing, and discovery is not required; but law has." That there should appear affirmatively some cause for equitable relief, independently of the presentation of numerous items of account, before the equity side of the court will be opened to entertain the question is manifest. This proposition has been clearly held in *Grafton v. Reed*, 26 W. Va. 437; *Bowen v. Johnson*, 12 Ga. 9, and *Upton v. Paxton*, 72 Ia. 295, 33 N. W. 773. No error was committed in refusing a jury trial as to the second and third paragraphs of complaint.

The questions arising upon the first paragraph of complaint were of legal cognizance and triable by a jury, and for the error in denying a jury trial thereof, the judgment as to that paragraph is reversed, with instructions to grant a new trial as to such paragraph of complaint and the issues thereunder.

THE WABASH PAPER COMPANY v. WEBB.

[No. 17,807. Filed December 1, 1896.]

146	303
148	121
152	598
146	303
168	356

APPEAL AND ERROR.—Bill of Exceptions.—Entry.—Where the court entry showing the filing of the bill of exceptions erroneously refers to the bill as appellant's "longhand transcript of the evidence," such unnecessary words may be rejected as surplusage.

BILL OF EXCEPTIONS.—Filed in Open Court.—The filing of a bill of exceptions with the clerk in open court is equivalent to a filing in the clerk's office.

MASTER AND SERVANT.—Negligence of Servant.—A servant nineteen years of age, active and intelligent, is guilty of negligence in stepping over a revolving shaft projecting fourteen inches above the floor, containing projecting oil cups and set screws, instead of passing out by either of two other ways which were generally used, and were comparatively safe, although he testified that he was unaware of the presence of the set screw or oil cup, where the evidence showed that he had for nearly two years worked in the mill, and for three weeks in and about this particular machinery, oiling the shaft at the point where he was hurt.

SAME.—Assumed Hazards.—Where a paper mill and machinery was constructed and maintained after approved plans, although

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the gearings, set screws, pulleys, belts, and other exposed parts of machinery might be rendered more safe by being boxed, such extraordinary care cannot be required, and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employe.

From the Grant Circuit Court. *Reversed.*

O. H. Bogue, W. G. Sayre and Brownlee & Paulus,
for appellant.

A. E. Steele, Alvah Taylor and Pettit & Stitt, for
appellee.

HOWARD, J.—Appellee was injured in the paper mill of appellant, his employer, and thereupon brought this action for damages, alleging that his injury was caused by the negligence of appellant. In appealing from the judgment rendered in favor of appellee, appellant assigns as error: (1) The insufficiency of the complaint; (2) the overruling of the motion for judgment on the answers to interrogatories; and (3) the overruling of the motion for a new trial.

We have read the complaint and find it carefully drawn, and not subject to the criticisms urged against it by appellant. Neither do we think the court erred in overruling the motion for judgment on the answers to interrogatories, notwithstanding the general verdict. The facts found specially, while perhaps not of themselves sufficient to authorize a judgment in favor of appellee, yet, taken as they must be without intendment, do not seem to be in irreconcilable conflict with the general verdict.

Appellee objects to our consideration of the bill of exceptions containing the evidence, as not being in the record. There is a court entry showing the filing of the bill in open court. This entry erroneously refers to the bill as appellant's "longhand transcript of the evidence," whatever may be meant by that phrase.

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The paper so filed, however, is also, and properly, styled appellant's bill of exceptions; and an examination of the paper shows it to be, in due form, such a bill, containing, incorporated therein, the longhand manuscript of the evidence taken at the trial. The unnecessary words in the court entry may be rejected as surplusage. Because the bill was filed in open court it does not follow that it was not filed in the clerk's office, as required by law. The filing with the clerk in open court is equivalent to a filing in the clerk's office. There is also some irregularity in the clerk's certificates as to the filing of the longhand manuscript of the evidence and its incorporation in the bill; but it is sufficiently shown, as we think, that the manuscript was first filed in the clerk's office and then incorporated in the bill of exceptions before the bill was presented to the judge, and that the bill was presented to the judge within the time limited and was itself then filed. This is all that is required.

From the evidence, it appears that the accident to appellee occurred at about 6 o'clock on the evening of November 7, 1892. Appellee was then nearly nineteen years of age, active and intelligent for his age, and with good eyesight and hearing. He understood his work well, had been engaged in the appellant's paper mill for a year and nine months, and in the room where he was hurt for three weeks previous thereto. The mill ran night and day, one set of hands working for a week during the day and another for the same time during the night, after which they changed places during the next week, and so on. Appellee had worked in the room where he was injured for two weeks during the day and for one week during the night, and at the time of the accident was about to begin his second week's night work. The room where he worked was well

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lit by electricity during the night, and was so lit when his injury occurred. He was the "third man," being next under the tender and back-tender. Among his duties were "to do the oiling and cleaning up." He was "general roustabout about the machine," and oiled the machinery every day or night when he was working.

After coming into the room on the evening in question he hung up his coat and hat, and with another young man stood for a short time talking to several girls who were at work. He had not yet put on his overalls when the tender called him to assist in guiding a sheet of finished paper from the "reel" to the "cutter." These machines stand one in front of the other, with an open space between them of 26½ inches, through which the running sheet of paper passes from the rolls, to be cut into such sizes as desired. The paper runs two feet above the floor at one of the machines and four feet at the other. The evidence is conflicting as to whether the sheet sagged in the open space on this occasion; it usually sagged when first connected with the cutter, and then ran "taut." When appellee was called to assist in guiding the paper to the cutter at this time, he stood inside, or on the east of the machines, and took one edge of the paper in his hands, while the tender stood on the west or front side and held the other edge. The paper was several feet in width, and they held it until it was caught by the cutter, after which it ran automatically. Appellee was then to leave his place and come back to the front, or west side, of the machines. The usual way of returning was to stoop under the running paper and pass back by the open space between the machines. One could also reach the front by passing out to the east and around north of the cutter. To go this way he would have to first pass through a ten-inch space, be-

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tween a pulley on the north and a shaft-support on the south. He would then be in a small square with shafting and other machinery on every side. Out of this square the exit that seems to have been provided by appellant was to the southeast, between two stands or supports, at right angles to each other, on the one of which rested the end of the "reel" shaft and on the other the end of the shaft that turned the "cutter." This space was nineteen inches in width. The cutter shaft was connected at its north end, at right angles, by fourteen-inch gearing, with the shaft which directly operated the cutter. Near to the gearing, on a "friction clutch" over the cutter shaft was an oil cup, and about one-fourth the way around the clutch from the oil cup was a set screw to hold the clutch close to the shaft. When the machinery was in motion the cutter shaft made from 65 to 100 revolutions in a minute. The evidence is again in conflict as to whether the oil cup and set screw could be seen when the shaft was so revolving. The cup and the screw each projected from the clutch about an inch and three-quarters.

Appellee, when passing out to go around to the front, did not return west under the running paper, but went east. He did not, however, go out by the exit to the southeast. He says the floor there was slippery with oil. He started to go out across the cutter shaft, near the clutch and gearing; and there he fell over, his left leg striking between the gearings, by which it was crushed and torn. The shaft and clutch over which he attempted to step were about fourteen inches high; and, to get over, one "would have to step about fourteen or fifteen inches high, and maybe between two and a half and three feet in length." His testimony is that he was thrown upon the gearing by having his clothing, near his left foot, caught by the oil cup and the set screw. He says he did not see

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either the cup or the screw, that these could not be seen when the shaft was revolving, that the shaft was always revolving when he saw it, and that he had no knowledge of the existence of either the cup or the screw. He admits that he was constantly about this machinery during the time his work was on, that it was his duty to oil it and clean it; that he had oiled this shaft close up to the clutch, "just as close as he could get at it." But he says that for the reason that the shaft was in motion he never saw the cup or screw. He knew that set screws and oil cups are found on revolving shafts, and that it is dangerous to step over them. He had often passed from the rear to the front of the machines, going directly under the running paper, or by the exit between the ends of the shafts of the two machines. The reason that he gives for not going under the paper on this occasion is that the paper was sagged to the floor. It appears, however, that in such a case the paper could be raised up by hand and one could thus pass under; and this seems to have been the usual way. The reason given for not passing out by the open nineteen-inch exit, as already suggested, is that once before he had slipped on the oiled floor going that way, and he feared that now he might fall against the pulley near the end of the cutter shaft. Other witnesses did not find this way at all dangerous. Besides, it was one of appellee's duties to keep the floor clean of oil.

It is not doubted that, without regard to the presence of the oil cup and set screw, the attempt to pass over the revolving shaft, fourteen inches above the floor, especially so near to the clutch and gearing, was hazardous; and it is the theory of the appellant that in attempting this high and long step, the appellee missed his footing and was so thrown into the gearing. Whether this be correct, or whether, as the jury found,

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the accident was caused by his clothing being caught by the oil cup and set screw, still the exit chosen by him over the turning shaft and near to the gearing seems to have been a very dangerous one. The evidence shows that it was a rare thing for any one to go out that way. Whether his duty required him to hurry about is not clear from the evidence. But even if it did, that would not justify him in taking this hazardous route, when, even if the paper were sagged, by waiting a moment the sag would have been taken up; or he might lift it as others did, and thus certainly pass back in safety by the way he came, to say nothing of going by the open nineteen-inch passage.

But, even granting all that appellee contends for—that the nineteen-inch exit was dangerous by reason of the oily floor; that the sagged paper obstructed the return by the way he came; and that he did not see and did not know of the presence of the oil cup and set screw—still we do not think that he has shown himself free from negligence. He was almost a man of full age, was bright, active and intelligent, had worked in this mill for nearly two years, and in and about this particular machinery for three weeks, oiling even the very shaft and clutch at the point where he was hurt. He knew, as he says, of the danger of stepping over projecting oil cups and set screws on revolving shafts. We think, consequently, that if he did not see or know of the cup and screw, which he claims caused his injury, he ought to have seen them and known of them. *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449.

Witness after witness testified that the cup and screw could be seen by any one who looked at the place they were. We do not think he could work right there for three weeks, even oiling at the very place, without seeing them. It rather seems probable, as one or two witnesses testify, that he was in a hurry to

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get around to continue his conversation with those with whom he had been talking when called by the tender to assist in running the paper from the reel to the cutter.

Besides, we are unable to see from the evidence adduced that the appellant was in any way at fault. The jury find, as the evidence also shows, that the paper mill and machinery were constructed and maintained after approved plans, of good pattern and design, of good material, adapted to the use for which they were intended, and such as are in use in the best paper mills. It is possible that gearings, set screws, pulleys, belts and other such exposed parts of machinery might be rendered more safe by being boxed. But well conducted mills are operated without this extra care; and if usual and ordinary care is shown in the procurement and maintenance of machinery, that is all that can be asked. Extraordinary care cannot be demanded; and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employe. And if it be conceded that the oil cup and set screw could not be seen when the shaft was in motion, yet we can not for that reason say that such necessary and usual attachments constitute a hidden defect to one who for nearly two years has been an employe in the paper mill where they are found, and who for three weeks has been engaged in the very room where they are used, constantly working around, oiling and cleaning the very machinery to which they are attached.

The evidence adduced on the trial was not, as we think, sufficient to support the essential allegations of the complaint, and hence not sufficient to sustain the verdict.

Judgment reversed, with instructions to grant a new trial.

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BOARD OF COMMISSIONERS OF HUNTINGTON COUNTY
v. BONEBRAKE.

[No. 18,059. Filed December 2, 1896.]

APPEAL.—Review.—Law of Case.—A decision of the Supreme Court constitutes the law of the case, so far as the principle involved is applicable, throughout all stages of the cause thereafter; this is true regardless of whether the question arose each time in the same manner.

NEGLIGENCE.—Defective Bridge.—A person having no knowledge of a defect in a bridge is not guilty of negligence in passing over the same, though he may have no legitimate business requiring him to do so.

TRIAL.—Interrogatories to Jury.—Special Verdict.—In an action against a county for damages for personal injuries sustained by reason of a defective bridge, an interrogatory, "Was not plaintiff's fall and injury occasioned solely by reason of the rotten, defective and doty condition of the timbers of said bridge, and the failure of the defendant to repair the same?" does not submit a question of law to the jury, and is not in violation of the act of March 11, 1895, prescribing that each interrogatory to the jury be so framed as to require the finding of but one fact.

PRACTICE.—Conclusion of Negligence.—Special Verdict.—The conclusion of negligence is not for the jury where a special verdict is returned.

TRIAL.—Interrogatory to Jury.—When Improper.—In an action for damages for personal injuries the following interrogatory to the jury, "Was not said injury received without any fault or negligence of the defendant?" is improper as involving both the law and the facts.

SAME.—Interrogatory to Jury.—Ultimate Conclusion of Fact.—Where, in an action against a county for damages for personal injuries resulting from a defective bridge, it was found that the injuries resulted from the decayed condition of the bridge, of which the defendant had knowledge and failed to repair, and that the plaintiff had no knowledge of the defects, that he went over the bridge slowly and carefully, and that he could not have seen the defects, an interrogatory to the jury calling for an ultimate conclusion of fact as to plaintiff's contributory negligence is improper.

PRACTICE.—Special Verdict.—Improper Findings.—Improper findings in a special verdict do not defeat the verdict but should be disregarded.

146	311
148	63
148	342
148	464
148	616
149	69
151	399
151	579
152	312
152	539

146	311
162	806

146	311
164	410

146	311
166	66
168	459

146	311
170	260

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SAME.—*Interrogatories to Jury, When May Be Rejected by Court.*—

It is not error for the court to reject interrogatories propounded to the jury, where there are other interrogatories covering the same facts.

APPEAL.—*Erroneous Instruction.*—*When Not Available Error.*—An erroneous instruction is not available error when it is such an instruction as cannot be applied by the jury.

From the Whitley Circuit Court. *Affirmed.*

O. W. Whitelock and *S. E. Cook*, for appellant.

Marshall, McNagny & Clugston and *R. A. Kaufman*, for appellee.

HACKNEY, J.—This is the second appeal in this cause, the former decision being reported in *Bonebrake v. Board, etc.*, 141 Ind. 62. The action was by the appellee to recover damages on account of personal injuries sustained in the crushing of a public bridge under the weight of a traction engine upon which he was riding. As will be seen from the report cited the appellee succeeded on the former appeal, and that one of the questions decided arose upon the action of the trial court in sustaining the demurrer of the board to the evidence. The principle then adhered to was that counties were required to keep such bridges in proper repair, and that a failure to do so, resulting in injury, without contributory negligence on the part of the person injured, subjected the county to liability for such injury. In the trial, resulting in the judgment from which the present appeal is prosecuted, the lower court followed, in its rulings, the theory upon which said appeal was decided and the appellee recovered a judgment for \$6,500.00.

After the decision of this court in *Bonebrake v. Board, etc.*, *supra*, it was held by us, in *Board, etc.*, v. *Allman*, 142 Ind. 573, that no liability rests upon counties for injuries resulting from the failure to re-

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pair public bridges, and the appellant now insists that upon the holding of the latter case the appellee's complaint stated no cause of action, and that the lower court erred in rendering judgment, upon the special verdict, in favor of the appellee. Opposing this insistence the appellee urges that the decision upon the former appeal in this cause established "the law of the case," which must be adhered to and which determines the sufficiency of the complaint. It is a general rule, many times followed in this State, that a decision of this court shall constitute "the law of the case," so far as the principle involved is applicable, throughout all stages of the cause thereafter. *Hailey v. Smith*, 45 Ind. 183; *Dodge v. Gaylord*, 53 Ind. 365; *Kress v. State, ex rel.*, 65 Ind. 106; *Test v. Larsh*, 76 Ind. 452; *Richmond Street R. R. Co. v. Reed*, 83 Ind. 9; *Board, etc., v. Pritchett*, 85 Ind. 68; *Gerber v. Friday*, 87 Ind. 366; *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101; *Rinard v. West*, 92 Ind. 359; *Anderson v. Kramer*, 93 Ind. 170; *Armstrong v. Harshman*, 93 Ind. 216; *Davis v. Krug*, 95 Ind. 1; *Jones v. Castor*, 96 Ind. 307; *Forgerson v. Smith, Admr.*, 104 Ind. 246; *Walker, Admx., v. Heller*, 104 Ind. 327; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225; *McCormick, etc., Co. v. Gray*, 114 Ind. 340; *Mason v. Burk*, 120 Ind. 404; *Nickless v. Pearson*, 126 Ind. 477; *Lillie v. Trentman*, 130 Ind. 16; *Cleveland, etc., R. W. Co. v. Wynant*, 134 Ind. 681; *Ohio, etc., R. W. Co. v. Hill, Admx.*, 7 Ind. App. 255. See also 2 Van Fleet's Former Adjudication, p. 1302; Elliott's App. Proced., section 578. See also 2 Van Fleet's Former Adjudication, p. 1302.

In *Forgerson v. Smith, supra*, it was said: "But where the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such ques-

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tions, the judgment on appeal rules the case throughout all its subsequent stages." Similar expressions of the effect of the rule are contained in many of the cases cited. If, therefore it is the question decided, the rule of law applied, that shall operate throughout the case, it cannot be important to look to the manner in which that question arose, whether upon demurrer to complaint, answer or evidence. If the conclusion were otherwise the rule would easily lose its force and confusion inextricable follow from holding, upon demurrer to the evidence, that a given state of facts permitted a recovery, while that same state of facts, pleaded in a complaint, constituted no cause of action. We must hold, therefore, that the appellant is precluded by "the law of the case" to insist that the county was not required to keep the bridge in repair and was not liable for the consequences of its failure to do so. We do not intimate a view of the case if the complaint had been amended, or the evidence were different, either as to the performance of the duty to repair, or as to the contributory fault of the appellee.

But one other ruling of the trial court is covered by the assignment of errors, and that is in overruling appellant's motion for a new trial, and several objections are made to that ruling. An interrogatory was submitted to the jury, asking if "the southeast corner of the bridge sagged down six inches immediately prior to the time of the accident," and it was answered, "No evidence to show what the condition was immediately prior to the accident." Appellant moved to require the jury to answer said interrogatory more specifically, and that motion was overruled. The testimony of the witness cited as affirming that the bridge, at the corner mentioned, was "sagged down six inches immediately" before the accident, was to the effect that some four years prior to the accident the bridge had, at the

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west end, "washed out until it had settled about six or eight inches at the corner." This, said witness further testified, was at a time when he repaired the bridge at the west end where it had washed out. The evidence does not relate to the inquiry either as to the time or the part of the bridge which had sunken down, and there was no error in refusing to require a more specific answer to the interrogatory.

The weight of the evidence upon the question of the appellee's knowledge of the defective condition of the bridge at the time he drove upon it is discussed by counsel. Appellee testified that he had no knowledge of defects, and it appeared that prior to the accident a petition was circulated for signatures in appellee's neighborhood, and was placed in his hands for examination and signature, in which petition it was stated that said bridge was in a defective condition and it was sought to procure the county board to rebuild it. This statement of the petition was not shown to have been read by the appellee, but if it had been so testified, the evidence would stand in conflict and we could not assume the province of the jury in passing upon it.

It is next contended that the answers to interrogatories 31, 35 and 36 were not sustained by the evidence. Said interrogatories, with the answers, were:

"No. 31. Was the plaintiff proceeding slowly and carefully over said bridge on said day? Ans. Yes.

"No. 35. Was not the plaintiff's fall and injury occasioned solely by reason of the rotten, defective and doty condition of the timbers of said bridge and the failure of the defendant to repair the same? Ans. Yes.

"No. 36. Was not said injury received without any fault or negligence of the defendant? Ans. Yes."

As we understand counsel for appellant, they support their contention upon this proposition by the evidence that the appellee did not own the engine, was

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not employed to ride upon or manage it, and was upon it only by the license of those in charge, and that he was, therefore, guilty of contributory negligence. While it is suggested by appellee's learned counsel that the same evidence of contributory negligence was passed upon in the former opinion of this court, and was held not sufficient to establish such contributory negligence, and that the question made by appellant's counsel is foreclosed by the law of the case, and while this proposition is not questioned by the appellant, it does not appear that one not knowing of a defect in a bridge should forego riding over it, unless he has legitimate business requiring him to do so, or that he might not, without negligence, ride over it for mere pleasure.

It is further objected that interrogatory 35 submitted to the jury a question of law and violated the act relating to special verdicts in the form of interrogatories and answers (Acts 1895, p. 248), in that it was so framed as to require the finding of more than one fact. In our opinion counsel err in both propositions. There is no question of law involved in the inquiry as to the cause of the bridge's fall, and there was but one fact which was sought from the evidence of the circumstances or conditions.

Interrogatory 45 asked: "In what sum was this plaintiff damaged by reason of the injury received by him by the collapse of said bridge?" This inquiry did not seek to elicit more than one fact nor the statement of a conclusion of law. Counsel merely suggest that it does, and do not offer a reason supporting same. No reason occurs to us for their construction of the interrogatory.

Interrogatory 32 was as follows: "Was the plaintiff, in passing over said bridge, * * * exercising such care, caution and prudence as persons of ordi-

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nary prudence would and do exercise under like circumstances?" This interrogatory and that numbered 36, it is contended, each submitted to the jury a question of law. The conclusion of negligence is not for the jury where a special verdict is returned. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Conner v. Citizens' Street R. W. Co.*, 105 Ind. 62; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275; *Louisville, etc., R. W. Co. v. Lynch*, (Ind. Sup.) 44 N. E. 997. It involves both the law and the facts. Interrogatory 36, therefore, was improper. The degree of care which persons of ordinary prudence would exercise under given circumstances is such as the law pronounces sufficient to relieve the actor from fault. As to whether that degree of care has been exercised may be determined from the facts disclosing the conduct of the party, the primary facts proven, or, in cases where the jury may draw the ultimate inference or conclusion from the primary facts, it may be disclosed by a statement that the conduct of the party, the primary facts being also given, was such as would have been that of persons of ordinary prudence under like circumstances.

Negligence exists when one has failed to exercise that care which persons of ordinary prudence and caution would exercise under like circumstances. Whether that degree of care has been exercised is a conclusion of fact and does not involve a question of law or the statement of a legal proposition. In reaching that conclusion the conduct of the party is not measured by any legal test or standard, but it is measured by the ideal ordinary person, whose care and prudence are not of the very highest, nor yet of the very lowest, but are such as from the common observation of men we conceive to occupy a position between

these extremes. He is called a person of ordinary prudence and caution. When the facts disclose that an injury has been received under circumstances in which the injured party has acted as would this ideal person, then the law is applied by the court and the legal conclusion and the judgment of due care follow. That the finding of the jury, that the injured party acted with such prudence and caution as this ideal person would have acted is not the equivalent of a finding of freedom from negligence, is made clear when we observe that such finding permits the court to apply the legal rule that such prudence and caution shall constitute due care, while, if the finding of non-negligence were properly returnable, the court would have no duty but to render judgment. The distinction may possibly be made clearer by recalling that where a general verdict is to be returned in a negligence case the court may properly instruct the jury that if it is found to be a fact that the plaintiff, in the occurrence, acted with such care and caution as a person of ordinary prudence and caution would have acted under like circumstances, then, as a matter of law, he was not negligent. If that which would thus be designated as a fact were a proposition of law, the instruction so framed would become absurd in that it would direct the jury that if a legal proposition should be found, a legal conclusion, the synonym of such proposition, would follow. This distinction between a finding of non-negligence and a finding of the facts which the law denotes non-negligence was recognized in *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533.

The interrogatory numbered 32 did not ask the statement of a legal conclusion, nor did it inquire for one of the primary facts establishing the appellee's conduct, but it was an inquiry as to the ultimate conclusion of fact authorized to be drawn only from

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primary facts. As to whether this was permissible depends upon the inquiry as to whether this was one of the cases where the jury is permitted to return the ultimate fact. Such a case is, that where two or more inferences may be reasonably drawn, that is, where, upon the facts, one impartial sensible man may reasonably draw one inference while another impartial and equally sensible man may reasonably draw the opposite inference. *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39.

The present case is not of that class. Here it was found that the injury resulted from the decayed condition of the bridge, of which condition appellant had knowledge and failed to repair the same; that the appellee had no knowledge of the defective condition of the bridge; that he went upon and over said bridge slowly and carefully, and that he could not have seen its defects. These were the essential primary facts, in connection with those of the injury, which required the conclusion from the court, in applying the law of the case, that appellee should recover. They established a duty neglected, with resultant injury, sustained without contributory fault. The interrogatories 32 and 36, therefore, although unauthorized, were not essential to the support of the judgment and if cast out, would not impair the verdict. It is an established rule of practice that improper findings in a special verdict do not defeat the verdict, but should be disregarded. *Louisville, etc., R. W. Co. v. Miller*, *supra*; *Jones v. Casler*, 139 Ind. 382; *Equitable Acc. Ins. Co. v. Stout*, 135 Ind. 444; *Louisville, etc., R. W. Co. v. Treadway*, 143 Ind. 689.

Complaint is made that the court rejected several interrogatories, propounded by the appellant, such as, Did the plaintiff frequently cross the bridge? Did he see a petition for a new bridge? Was he asked to

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sign such petition? Did he know of the defective condition of the bridge? Was he injured in a runaway, after the accident of the falling bridge? Several of these inquiries sought merely evidentiary findings relating to the fact of knowledge or the absence of knowledge, on the part of the appellee, of the defects in the bridge. There were interrogatories and answers properly covering the facts in dispute upon that question, besides it is not the proper practice to find merely evidentiary matters. The inquiry as to an injury in a runaway, if answered in the affirmative, would have given us no light upon the question as to whether the damages were excessive, and we suppose that could have been its only purpose. We could not know that such injury was slight or serious, whether it was upon the limbs or parts of the body injured in the bridge accident, or whether the jury considered such injury apart from that occasioned by the falling of the bridge, and allowed nothing on that account.

It is objected, also, that the damages, \$6,500.00, were excessive. There was conflict in the evidence as to the character and extent of the appellant's injuries; some of the evidence for the appellant tending to show that to some extent he feigned greater disabilities than he really suffered from. The jury found that he was permanently disabled; that from the occurrence in July 1890, to the time of the trial, in September, 1895, he suffered great bodily pain continuously, and was rendered incapable of performing labor upon the farm; that he was "crushed, bruised and maimed in his hips and spine," and that he was, prior to said injury, "a strong, vigorous man, able to perform the work on his farm."

Much evidence supports these findings, and we can not pass upon the conflict and determine whether they were supported by a preponderance of the evidence.

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Two additional questions presented involve the propositions already decided with reference to "the law of the case," the overruling of appellant's motion for judgment on the verdict and the sustaining of appellee's motion for judgment on the verdict. It is complained further that the court erred in giving a general instruction with reference to the appellant's duty to keep the bridge in repair when a special verdict was required. An error in such an instruction would not be available, because it could not be applied by the jury. *Louisville, etc., R. W. Co. v. Lynch, supra; Wollen v. Wire, Admr.*, 110 Ind. 251.

No error in the instruction is pointed out, and we perceive none.

Only one other question is suggested, and it is not discussed; that is that the court refused to permit appellee to answer appellant's question as to whether "there wasn't a great deal of contention in that neighborhood between Tobias Myers, the road supervisor, and Mr. Provines, the trustee, about the repair of the bridge * * * and other bridges" prior to the accident?

The inquiry did not relate to the appellee's knowledge of any defects in the bridge, and if answered in the affirmative it does not occur to us that it could have had any bearing upon the case.

Finding no available error in the record the judgment is affirmed.

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[No. 17,292. Filed March 24, 1896. Motion to modify overruled December 2, 1896.]

EQUITY.—Reformation of Mortgage.—Mutual Mistake.—When it appears that by mutual mistake of all the parties to a mortgage as to a matter of fact, the instrument does not express their agreement, a court of equity will reform the instrument by correcting such mistake. *p. 329.*

SAME.—Reformation of Mortgage.—Subsequent Purchasers.—Judgment Creditors.—Notice.—A mutual mistake of all the parties to a mortgage may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the facts and against judgment creditors of the mortgagor or such purchaser with notice. *p. 329.*

MORTGAGE.—Preexisting Debt a Valid Consideration.—A preexisting debt is a valid consideration for a mortgage, but is not such a consideration as will constitute the mortgagee a *bona fide* purchaser, in the sense to cut off prior equities. *p. 330.*

EQUITY.—Reformation of Mortgage.—Mutual Mistake.—Consideration.—Any consideration that will support a mortgage is sufficient to entitle the mortgagee to maintain an action to correct a mutual mistake in the same against the mortgagor and those holding under him as purchasers with notice and their judgment creditors. *p. 330.*

SAME.—Reformation of Contracts.—When Demand is Necessary.—Where the only relief sought is the reformation of a deed, mortgage or other contract, a previous demand is essential; but where, in addition to the reformation, a recovery is demanded, no prior demand is necessary. *p. 334.*

SAME.—Laches.—While equity aids the vigilant, courts of equity have never fixed any definite or specific period of delay that, like the statute of limitations, will bar the right to equitable relief from fraud or mistake. *p. 334.*

SAME.—When Contract May Be Reformed.—Equity will reform a written contract between the parties whenever, through mutual mistake, or mistake of one of the parties accompanied by fraud of the other, it does not, as reduced to writing correctly express the agreement of the parties. *p. 340.*

SAME.—Action to Reform Written Instrument.—Complaint.—In an action to reform a written instrument the plaintiff must set forth the terms of the original agreement, and also the agreement as re-

146	322
148	123
150	496

146	322
158	206

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duced to writing, and point out with clearness wherein was the mistake.

SAME.—Reformation of Mortgage.—Mutual Mistake.—Must Have Been Agreement Prior to Execution of Mortgage.—Where a creditor without any previous agreement, express or implied, prepared a mortgage covering only a part of a debtor's lands, and presented same to such debtor, the creditor believing that all of debtor's lands had been included in the mortgage, the debtor not knowing the intention of the creditor except as revealed by the written instrument, executed and delivered the mortgage, an action for the reformation of the mortgage on the ground of mutual mistake can not be maintained. pp. 338-349.

SPECIAL FINDING.—When Outside of Issues.—To the extent that a special finding is outside of the issues in a cause, it is a nullity and can give no support to a conclusion of law thereon. p. 349.

From the Warren Circuit Court. *Affirmed in part and reversed in part.*

C. V. McAdams, for appellant.

J. F. Hanly, for appellees.

MONKS, J.—Appellant brought this action to foreclose a mortgage given it by appellee, Melville A. Judy. Appellee, Elizabeth Judy, filed a cross-complaint to foreclose a mortgage executed to her by said Melville A.; appellee, the Central State Bank of West Lebanon, filed a cross-complaint asking the correction of a mistake in a mortgage executed to it by said Melville A. Judy and for a foreclosure of the same as corrected.

After issues joined the cause was tried by the court, and by request of appellant a special finding of facts was made and four conclusions of law stated thereon, and at the proper time appellant excepted separately and severally to the first, second and third conclusions of law.

Judgment was rendered by the court in accordance with the finding of facts and conclusions of law. Appellant filed a motion to modify the judgment, which

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was overruled. The errors assigned by appellant and not waived are:

1. The court erred in each of its conclusions of law.
2. The court erred in overruling appellant's motion to modify the decree and judgment.

The special finding and conclusions of law, so far as necessary to the decision of the questions presented, are as follows:

"First. That on the 15th day of September, 1890, and for a long time prior thereto, the defendant, Melville A. Judy, had been and was then the owner in fee-simple of the following described real estate, situate in Warren county, Indiana: The north one-half (1-2) of section twenty-three (23), the northwest quarter of section twenty-four (24), the east one-half (1-2) of the southwest quarter of section twenty-four (24), and five (5) acres off of the west side of the southwest quarter of the southeast quarter of section twenty-four (24), all in township twenty-two (22) north, of range nine (9) west. Also an undivided interest in the northwest quarter of the southwest quarter of section twenty (20), in township twenty-two (22) north, of range eight (8) west.

"Second. That on the 15th day of September, 1890, the defendant, Melville A. Judy, was indebted to the defendant, the Central State Bank of West Lebanon, Indiana, in the sum of \$3,200.00, evidenced by his note then past due; that on said date said Melville A. Judy executed to the Central State Bank aforesaid a note for the sum of \$3,200.00, to become due ninety days thereafter, together with interest thereon at eight per cent. after maturity and waiving relief from valuation and appraisement laws and providing for ten per cent. attorneys' fees, and in consideration thereof the old note was delivered to him and the time of payment of such debt thereby extended. Said new

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note being the note sued upon by the cross-complainant, the Central State Bank of West Lebanon, Indiana. That on the 14th day of November, 1890, the said Melville A. Judy was indebted to the Central State Bank of West Lebanon, Indiana, in the further sum of \$6,682.20, evidenced by his note to such bank then past due; that on said date the said Melville A. Judy executed to such bank his promissory note for said sum, to become due six months thereafter, together with eight per cent. interest thereon after maturity and providing for ten per cent. attorney's fees, waiving relief from valuation and appraisement laws; that in consideration of the execution of such note the said old note was surrendered by such bank and the time for payment of such debt was thereby extended for a period of six months from said November 14, 1890. Said new note being the second note sued upon in this case by the cross-complainant, the Central Bank aforesaid; that there is now due on said two notes sued upon by the Central State Bank of West Lebanon, Indiana, the sum of \$9,313.68, principal and interest, and the sum of \$931.36 attorney's fees, making a total indebtedness on account of such notes in the sum of \$10,245.04.

"Third. That on the 17th day of November, 1890, Frank C. Fleming, the acting cashier of the Central State Bank of West Lebanon, Indiana, prepared a real estate mortgage, securing the payment of the notes sued upon in this cause by said bank and described in second finding of the court; that on said date said cashier, with a notary public, went to the residence of the defendant, Melville A. Judy, about four miles in the country, for the purpose of having such mortgage executed by said defendant; that on arriving there the mortgage was tendered to said defendant and he was requested by such cashier to execute the same, for

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the purpose of securing said notes; that after said defendant had read and examined such mortgage, he duly executed the same, before such notary, and delivered it to said cashier; that such mortgage contains a description of the following described real estate, situate in Warren county, Indiana: The northwest quarter and the west one-half (1-2) of the northeast quarter of section twenty-three (23), also the east one-half (1-2) of the northwest quarter, and the southwest quarter of the southwest quarter of section twenty-four (24), all in township twenty-two (22) north, of range nine (9) west. The court further finds that such mortgage was duly recorded in the recorder's office of Warren county, Indiana, on December 9, 1890. The court further finds that there was no agreement between the Central State Bank of West Lebanon, Indiana, and the defendant, Melville A. Judy, that a mortgage should be given by him on his real estate to secure the notes sued upon by such bank, prior to the execution of such mortgage; that at the time such mortgage was executed there was no agreement between said bank and said Judy as to what lands should be embraced in such mortgage, and that at no time prior to the execution of such mortgage, nor at any time, was anything said, by the cashier of said bank or said Judy, as to what lands should be embraced in such mortgage; that the cashier of said bank, when he drafted such mortgage, intended to embrace therein all the lands then owned by defendant Judy, and above set forth in the first finding of the court, and that the officers of said bank supposed and understood that the mortgage so executed did embrace all such lands, until in January, 1893, when they learned that a mistake had been made therein; that the defendant, Judy, at the time he executed such

mortgage supposed the same contained a description of all the real estate as above set forth in the first finding of the court, and that the defendant, Judy, intended to embrace and include and describe all of said lands in such mortgage.

"Fifth. That on December 21, 1892, the defendant, Melville A. Judy, was indebted to the Citizens' National Bank of Attica, Indiana, for money borrowed, in the sum of more than \$5,000.00, evidenced by his note therefor then past due; that such debt had been in existence for a period prior to September 15, 1890, and had been renewed from time to time by the payment of interest and the execution of new notes; that on said December 21, 1892, the defendant, Melville A. Judy, executed to the plaintiff his note for the sum of \$4,500.00, to become due in six months thereafter with eight per cent. interest thereon after maturity and ten per cent. attorney's fees and waiving relief from valuation or appraisement laws; that in consideration of the extension of the time for the payment of that portion of such debt, evidenced by such new note, the defendant, Melville A. Judy, on said date paid to the plaintiff the residue of such old debt then due and executed and delivered to the plaintiff, for the purpose of securing such note of \$4,500.00, then made a mortgage on the following described real estate, situate in Warren county, Indiana: The east one-half (1-2) of the northeast quarter of section twenty-three (23), the northwest quarter and the east half (1-2) of the southwest quarter, and five (5) acres off of the west side of the southwest quarter of the southeast quarter of section twenty-four (24), all in township twenty-two (22), north of range nine (9) west. Also his interest in the northwest quarter of the southwest quarter of section twenty (20), in township twenty-two (22) north, of range eight (8) west; that such mortgage was duly re-

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corded in the office of the county recorder of Warren county on December 21, 1892; that the renewal note so executed on December 21, 1892, for \$4,500.00, is the note sued upon by the plaintiff in this cause, and that there is now due and unpaid on the same the sum of \$4,782.00 principal and interest, and the further sum of \$478.00 attorney's fees, making a total indebtedness now due on such note of \$5,260.00.

"Sixth. That the Central State Bank of West Lebanon, Indiana, in January, 1893, acquired notice and knowledge of the execution and delivery by the defendant, Melville A. Judy, to the plaintiff of the mortgage sued upon by the plaintiff in this cause; that said defendant, the Central State Bank, did not at any time thereafter give to the plaintiff any notice that it claimed to have a mortgage on all the real estate of the defendant, Judy, and did not at any time take any steps to correct the mistake claimed to exist in its mortgage until it filed its cross-complaint in this cause on December 27, 1893."

Conclusions of law: "1st. That the cross-complainant, the Central State Bank of West Lebanon, Indiana, is entitled to judgment against the defendant, Judy, for the sum of \$10,245.04; that such cross-complainant is entitled, as against the plaintiff and all the defendants excepting Elizabeth Judy, to have its mortgage corrected and reformed, and that the lien of the mortgage of said cross-complainant when reformed is the first and prior lien upon all of the lands described in the first finding of the court excepting the east one-half (1-2) of the northeast quarter of section twenty-three (23), and the west one-half (1-2) of the northwest quarter and the east one-half (1-2) of the southwest quarter of section twenty-four (24), all in township twenty-two (22) north, of range nine (9) west, in Warren county, Indiana, and that such cross-com-

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plainant is entitled to have its mortgage foreclosed as corrected.

"Third. That the plaintiff, the Citizens' National Bank of Attica, Indiana, is entitled to judgment against the defendant, Melville A. Judy, for the sum of \$5,260.00; that the lien of the plaintiff's mortgage is junior and subsequent to the lien of the mortgages executed to the Central State Bank and Elizabeth Judy upon the lands therein described, after the mortgage to the Central State Bank is reformed; that the plaintiff is entitled to have its mortgage foreclosed."

It is settled law that when it appears that by the mutual mistake of all the parties to a mortgage, as to a matter of fact, the instrument does not express their agreement, a court of equity will reform the instrument by correcting such mistake. *Parish v. Camp- lin*, 139 Ind. 1; *Walls v. State ex rel. Aud.*, 140 Ind. 16; *Board, etc., v. Owens*, 138 Ind. 183; *Easter v. Severin*, 78 Ind. 540; *Sparta School Tp. v. Mendell*, 138 Ind. 188; *Dutch v. Boyd*, 81 Ind. 146, 150, and cases cited.

Such mistake may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the facts and against judgment creditors of the mortgagor or such purchaser with notice. *White v. Wilson*, 6 Blackf. 448, and authorities cited, 39 Am. Dec. 437; *Sample v. Rowe*, 24 Ind. 208, 215; *Busen- barke v. Ramey*, 53 Ind. 499, 501; *Figart v. Halder- man*, 75 Ind. 564, 568; *Boyd v. Anderson*, 102 Ind. 217, 220, and cases cited; *Shirk v. Thomas*, 121 Ind. 147, 150, 151; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, 565.

Appellant, however, insists that if it was a purchaser with notice of the claims of the appellee bank, yet the Central State Bank was not entitled to have its mort-

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gage corrected and reformed, for the reason that it was given for a preexisting debt.

The second special finding, as claimed by the appellant, shows that the mortgage was given to the appellee bank to secure a preexisting debt, and for no other consideration whatever.

It is the law in this State that a preexisting debt is a valid consideration for a mortgage, and that such mortgage can be enforced. *Wert v. Naylor*, 93 Ind. 431; *Louthain v. Miller*, 85 Ind. 161; *Hewitt v. Powers*, 84 Ind. 295; *Babcock v. Jordan*, 24 Ind. 14; *Work v. Brayton*, 5 Ind. 396; *Shirk v. Thomas*, *supra*; Jones on Chat. Mortg., section 81, and cases cited in note 5; 1 Cobbey on Chat. Mortg., section 126.

A preexisting debt, however, is not such a consideration as will constitute the mortgagee a *bona fide* purchaser, in the sense to cut off prior equities, but it is a valuable consideration in the sense that it will support a mortgage or other contract. *Hewitt v. Powers*, *supra*; *Orb v. Coapstick*, 136 Ind. 313; *Petry v. Ambroscher*, 100 Ind. 510, and cases cited; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607.

It seems clear that any consideration that would support a mortgage would be sufficient to entitle the mortgagee to maintain an action to correct a mutual mistake in the same against the mortgagor and those holding under him as purchasers with notice and their judgment creditors. *Welton v. Tizzard*, 15 Ia. 495; *Rhodes v. Outcalt*, 48 Mo. 367; *Brocking v. Straat*, 17 Mo. App. 296; *Partridge v. Smith*, 2 Biss. C. C. 183; *Baker v. Pyatt*, 108 Ind. 61; 15 Am. and Eng. Ency. of Law, 681, and note 1; 1 Pingrey on Mortgages, section 530.

In *Welton v. Tizzard*, *supra*, the court held that a mortgage given to secure a preexisting debt, and sup-

ported by no new consideration, could be corrected as against the mortgagor and subsequent judgment creditors. The court, by Dillon, J., said: "The plaintiff is confessedly first in point of time. His is the elder right. The debtor, for a valid consideration, agreed to execute a mortgage (for the deed of trust may, for the purposes of this suit, and for the convenience sake, be so called), on lands which he owned, not on lands which he did not own. That is, he agreed, and undertook, though defectively, in the eyes of a court of law, to bind these lands of his, to set them apart, specifically to appropriate them to the plaintiff. Now, in equity, he did thus bind, appropriate, and set them apart. Therefore, in equity, which deems as done that which the party has agreed to do, the plaintiff had not only a mortgage, but a mortgage on the right land—on the land intended. In equity, the plaintiff did not, as contended, simply attempt to get a lien, but he actually secured a lien on the parcels designed to be conveyed to him; and not a lien, merely, but his rights were such that he * * would be regarded by the decisions of other courts in the light of a purchaser. *Porter v. Green*, 4 Ia. 571; *Scevers v. Delashmutt*, 11 Ia. 174. The debtor is bound, in conscience, to correct the mistake. His obligation to correct it was such an equity as would bind his heirs, voluntary grantees, or purchasers with notice. Such are the plaintiff's rights. Now, the defendant is subsequent in point of time. * * * He comes in under the debtor, that is, under one who in conscience is bound, and who in equity would be compelled to rectify the error in the antecedent conveyance."

Rhodes v. Outcalt, *supra*, was an action brought by a mortgagee against the mortgagor and a subsequent purchaser with notice, to correct a mistake in the descriptive part of a mortgage, given to secure a pre-

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existing debt, and the court held that such mortgagee was entitled to a reformation of the mortgage against the mortgagor and the said subsequent purchaser with notice. This case was followed by *Brockling v. Straat, supra*.

In *Baker v. Pyatt, supra*, this court held that equity will not intervene for the reformation of a deed which is purely voluntary; but a deed by a father to a son in consideration of services already rendered and love and affection may be reformed. The court, by Zollars, J., said: "It is settled that equity will not intervene for the reformation of a deed which is purely voluntary, resting upon no valuable consideration whatever. * * On the other hand, if there is any valuable consideration, no difference how small, supplemented by the consideration of love and affection, a mistake in a deed may be reformed. *Mason v. Moulden*, 58 Ind. 1. In that case the consideration was love and affection and \$1.00. It was said: 'Elizabeth was a purchaser for a valuable consideration, and mere inadequacy of consideration is no ground for withholding relief by way of reforming the deed, and thus giving her what she bought, and what her vendor intended to convey, and would, but for the mistake, have conveyed.' * * * Both the special finding of facts and the evidence show that the services rendered by appellee to his father were a part of the consideration for the conveyance to him. It is found that the services were not rendered by appellee with a view to any particular or specific compensation, other than as the father might deem proper. * * The father recognized the fact that appellee was entitled to some compensation for his services, and carried that recognition into the deed, and made the services a part of the consideration for the conveyance. * * * There was

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a mutual mistake, such as a court of equity, under all the circumstances of this case, will correct."

The case last quoted from certainly settles the proposition that a preexisting debt is sufficient consideration to entitle the grantee in a deed to correct a mutual mistake in the same as against the grantor and those claiming under him with notice. *Comstock v. Coon*, 135 Ind. 640, fully sustains the same doctrine. Yet this court held, in *Petry v. Ambroscher, supra*, that a person who receives a conveyance of real estate in payment of a preexisting debt, and for no other consideration is not a *bona fide* purchaser for a valuable consideration, in such sense as to be entitled to defeat a vendor's lien for the purchase-money of the land. This court, by Elliott, Judge, said: "A precedent debt is a consideration sufficient to support a contract. *Bowling v. Howell*, 93 Ind. 329, see p. 331; *Hewitt v. Powers*, 84 Ind. 295. It is not, however, such a consideration as will constitute a person a *bona fide* purchaser with rights superior to those of the unpaid vendor of the land."

In *Bowling v. Howell, supra*, this court said: "A precedent debt is unquestionably a valuable consideration for a contract, but is not such a consideration as will make a grantee or assignee a *bona fide* purchaser against prior equities. * * * As against one who has no prior equity, a precedent debt will support a contract otherwise valid."

The cases cited settle the proposition that it is not necessary that one be a *bona fide* purchaser in such sense as will cut off prior equities, in order to entitle him to successfully prosecute an action to correct a mutual mistake in a written contract.

It must be remembered that appellee bank does not claim to be a *bona fide* purchaser for a valuable consideration and thus seek to cut off the prior equities

of any one, but is attempting to correct an alleged mutual mistake in a mortgage as against a mortgagor and a subsequent purchaser with notice. It follows from what we have said and the authorities cited that the preexisting debt which the mortgage to appellee bank was given to secure, was sufficient consideration to entitle said appellee to a correction of the alleged mistake in said mortgage as against appellant, if the case were otherwise made out.

The next objection urged by appellant is stated thus: "It is nowhere shown in the findings of the court that the Central State Bank ever demanded a correction of the alleged mistake in its mortgage, and that such demand was met by a refusal. It is necessary in such suits to allege a demand for and a refusal to correct the alleged mistake. It is necessary to allege these things in the bill."

Appellee bank was not bound to demand a correction or reformation of the mortgage before filing the cross-complaint. The rule is that when the only relief sought is the reformation of deed or other contract, a previous demand is essential, but where, in addition to the reformation, a recovery is demanded, no prior demand is necessary. *Walls v. State, supra*; *Sparta School Tp. Co. v. Mendell, supra*, on page 195; *Axtel v. Chase*, 83 Ind. 546, 556; *Lucas v. Labertue*, 88 Ind. 277; Thornton Ann. Pr. Code, section 279.

Appellant insists that the delay of eleven months, as shown by the sixth special finding, from the time the Central State Bank learned of the mistake in its mortgage until it filed its cross-complaint, was such laches as will prevent the correction of the mistake in said mortgage as against appellant.

It is a well settled principle of equity jurisprudence that "Equity aids the vigilant, not those who slumber on their rights." 1 Pomeroy Eq. Jur., section 418.

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Courts of equity have never fixed any definite or specific period of delay that, like the statute of limitations, will bar the right to equitable relief from fraud or mistake, and it would be impossible for them to do so. In *Lindsay Petroleum Co. v. Hurd*, L. R. 5, P. C. 221, Lord Selborne, speaking of the doctrine of laches, said: "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other." It is evident, therefore, that what would be fatal laches in one case would not bar a recovery in another. In this case, the rights of no innocent third parties have intervened. Appellant, as stated in the eleventh finding, took its mortgage with notice of the claims of appellee bank, and if by accepting the mortgage and extending the same on its debt its hands were tied, the same was done with full knowledge of the claims of appellee bank, and it has no just grounds of complaint. Besides, the appellee bank did not learn of the alleged

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mistake until long after appellant took said mortgage. The relative position of the parties has not changed during the interval between the time appellee bank learned of the alleged mistake in its mortgage and the filing of its cross-complaint. No right of appellant has been injuriously affected by the delay.

We do not think the appellee bank has been guilty of such laches in this case as will deprive it of its right to a reformation of said mortgage, if it is otherwise entitled thereto.

The next contention of appellant is stated in its brief as follows: "The next question presented which arises principally on the third finding, is whether or not there ever was any contract between the Central State Bank and Judy other than the one expressed in the mortgage sought to be corrected. We claim there is no contract except that which is expressed in the mortgage, and that the only evidence of that contract, as shown by the findings, is the terms of the mortgage itself. It was alleged in the cross-complaint of the Central State Bank, that there was a contract that the lands of Judy not embraced in the mortgage were to have been included therein. Unless there was such a contract the court cannot find a mistake and decree its correction."

The allegation in said appellee's cross-complaint in regard to such contract is as follows:

"That on the said 15th day of September, 1890, and continuously thereafter until the present date, said defendant, Melville A. Judy, was and has been the owner in fee-simple of the following described real estate, situate in Warren county, in the State of Indiana, to-wit: The east half of the northeast quarter of section twenty-three (23). Also the northwest quarter of section twenty-four (24), and the east half of the southwest quarter of section twenty-four (24), and five

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acres off of the west side of the southwest quarter of the southeast quarter of section 24, all in township 22 north, range 9 west, containing three hundred and twenty-five acres; that on the said 15th day of September, 1890, said defendant, Melville A. Judy, in consideration of the sum of money named in said first described note, and for the further consideration of the sum mentioned in said last described note, and in consideration that the time of the payment of the said sums of money, which were then due, for the time indicated in said notes should be extended, agreed with this cross-complainant to execute and deliver to it for the purpose of securing the payment of the notes aforesaid, a mortgage upon all of the aforesaid real estate; that afterwards, to-wit: on the 17th day of November, 1890, said defendant, Melville A. Judy, pursuant to said agreement, and for the purpose of securing the payment of the notes aforesaid, made, executed and delivered to this cross-complainant, a mortgage upon all the aforesaid real estate, as he and said cross-complainant, at the time supposed, understood and believed; that it was the intention of said defendant, Melville A. Judy, and said cross-complainant that said mortgage should contain a description of all the aforesaid real estate, pursuant to the agreement aforesaid. And when said mortgage was executed and delivered each supposed and believed that the description of all the lands aforesaid had been duly inserted therein; that the scrivener who drew said mortgage, made a mistake, in this, he described said lands as "The northwest quarter of section 23, township 22, range 9 west, containing 160 acres; also the west half of the northeast quarter of section 23, township 22 north, range 9 west, containing 80 acres; also the east half of the northwest quarter of section

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24, township 22 north, range 9 west, containing 80 acres; also the southwest quarter of the southwest quarter of section 24, township 22 north, range 9 west.' Instead of describing them as the northwest quarter of section 24; the east half of the northeast quarter of section 23; the east half of the southwest quarter of section 24; and five acres off of the west side of the southwest quarter of the southeast of section 24, all in township 22 north, range 9 west, as it was desired, intended and understood by and between said defendant, Melville A. Judy, and his cross-complainant, that said lands should be described; that said mistaken and erroneous description was inserted in said mortgage, as hereinbefore described, by the mutual mistake, oversight and inadvertence of said scrivener, said defendant, Melville A. Judy, and this cross-complainant, and that because of said mutual mistake said mortgage wholly fails to truthfully set forth the intention of said parties to their said agreement; that at the time said mortgage was executed said Melville A. Judy did not own the lands therein described, except the east half of the northwest quarter of section 24, township twenty-two north, range nine west."

There is nothing in the special finding which sustains the allegation in the said cross-complaint that Judy agreed with the appellee bank to execute a mortgage to said bank on the real estate alleged, to secure said notes, and that pursuant to said agreement he executed the mortgage described in said cross-complaint.

The facts found in the third finding are, in substance, that the cashier of the appellee bank, without any previous arrangement, understanding, promise, contract or agreement, express or implied, with Judy, and without his knowledge or assistance, prepared the mortgage to said bank and took the same, with a

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notary public, to Judy, at his residence in the country, and requested him to execute the same for the purpose of securing the notes to said bank, described in the mortgage. Judy read the mortgage, signed and acknowledged the same before the officer, and delivered it to the cashier; that there never was any agreement at any time between appellee bank and Judy that any mortgage should be given by him on his real estate to secure the notes sued upon by said bank; that there was no agreement at any time as to what lands should be embraced in said mortgage, and that at no time was anything said by said cashier or Judy as to what lands should be embraced in said mortgage.

It is clear from the finding that there was no contract, express or implied, by the words or acts, or both, except the mortgage itself. It is true, as insisted by appellee bank, that the court found that the cashier intended, when he drafted the mortgage, to embrace therein all the lands then owned by Judy, set out in the first finding, and that the officers of the bank supposed and understood that the mortgage so executed did embrace all such lands, and that said Judy, at the time he executed the mortgage, supposed the same contained a description of all his real estate described in the first finding of the court, and that he intended to embrace and include and describe all of said lands in such mortgage. The finding shows that the intention and supposition and understanding of the officers of said bank as to what lands of Judy were embraced in the mortgage were unknown to Judy, except as he learned the same from the mortgage itself, and that the intention and supposition of Judy as to what lands were to be embraced in the mortgage were unknown to the bank and its officers.

The mere fact that the cashier of said bank intended to include all the real estate of Judy in the

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mortgage, and the officers of the bank supposed and understood that the mortgage so executed did embrace all such lands, such belief, supposition and understanding not being known to Judy when he executed the mortgage would give the bank no right to have such mortgage corrected so as to describe all of such lands; neither would the mere fact that Judy intended to execute a mortgage on all such real estate, and supposed he had done so, such intent and supposition being unknown to the officers of said bank when said mortgage was executed, give any such right. If there was no contract, express or implied, that the mortgage should include all of Judy's real estate, as alleged in the cross-complaint, the mere fact that each intended to include all such land in the mortgage, and believed it had been done, neither party having any knowledge of the intent or belief of the other, when in fact the same had not been described, would not entitle either party to reform such mortgage against the other, for the reason that there was no contract, express or implied, as to what real estate should be included, nor any arrangement or understanding, except as shown by the mortgage itself.

Equity will reform a written contract between the parties whenever, through mutual mistake, or mistake of one of the parties accompanied by the fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties. *Gray v. Woods*, 4 Blackf. 432; *Hileman v. Wright*, 9 Ind. 126; *Comer v. Himes*, 49 Ind. 482, 490; *Jones v. Sweet*, 77 Ind. 187; *Sparta School Tp. v. Mendell*, *supra*; *Monroe v. Skelton*, 36 Ind. 302; *Board, etc., v. Owens*, *supra*; *Hunt v. Rousmaniere*, 1 Peters (U. S.) 1; *Walden v. Skinner*, 101 U. S. 577; *Scales v. Ashbrook*, 1 Metc. (Ky.) 358; *German Nat'l Bank v. Louisville Butchers', etc., Co.* (Ky.), 29 S. W. 882; *Sawyer v. Hovey*, 85

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Mass. 331; *Clark v. Higgins*, 132 Mass. 586; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Miller v. Lord*, 11 Pick. 11; *Neininger v. State*, 50 O. St. 394, 40 Am. St. 674, 34 N. E. 633; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Jackson v. Andrews*, 59 N. Y. 244; *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Shay v. Pettes*, 35 Ill. 360; *Wemple v. Stewart*, 22 Barb. 154; Chitty on Cont. (11 Am. ed.), p. 1028, 12 Eng. ed., p. 864; 1 Wharton on Cont., sections 205, 206, 207; Fry on Specific Performance (3d Eng. ed.), sections 766, 791, 3d Am. ed., sections 754, 758; Pomeroy on Cont., sections 248, 249; Waterman on Specific Performance, sections 368, 369; 5 Lawson on Rights and Remedies, sections 2337, 2339; Wald's Pollock on Contracts (2d ed.), pp. 470-478; 2 Warvelle on Vendors, section 11, pp. 800, 801, section 15, pp. 804, 805; Pomeroy on Eq. Jur., sections 845, 853, 859, 1376; Tiedeman's Eq. Jur., section 507; 20 Am. and Eng. Ency. of Law, p. 714; Kerr on Fraud and Mistake, 409-424.

The rule is, that in an action to reform a written instrument the plaintiff must set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out with clearness wherein there was a mistake. *Thompson Scale Mfg. Co. v. Osgood*, 26 Conn. 16; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73; *Lewis v. Lewis*, 5 Or. 169; 20 Am. and Eng. Ency. of Law, 720; 1 Pinney on Mortgages, section 270; 2 Warvelle on Vendors, p. 801.

It is said in Pomeroy's Eq. Jur., section 1376: "Equity has jurisdiction to reform written instruments in but two well defined cases: (1) Where there is a mutual mistake,—that is, where there has been a meeting of minds,—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what

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was really intended by the parties thereto; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the agreement or transaction entered into, according to the intention of the parties."

In Tiedeman's Eq. Jur., section 507, it is said: "A legal instrument is a proper subject for reformation or re-execution, whenever the instrument itself does not show and reproduce the actual contract of the parties; but it is only possible for a written contract to be reformed, when the parties have actually made a contract which is different in its terms from the contract which had been reduced to writing. In other words, in order that an instrument may be reformed, the error or mistake, which has been committed in reducing the contract to writing, must be either a mutual mistake of both parties, or it must be a mistake on the part of one of them, accompanied by the fraud of the other party."

It was said by the Supreme Court of the United States, in *Walden v. Skinner, supra*: "That where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had re-

fused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties."

In *Shay v. Pettes, supra*, the court said: "From the evidence we are unable to find an agreement between the parties that the mortgage should include all the land sold, and that one of the parcels was omitted by mistake. We have no evidence by whom the mortgage was drafted, or under what circumstances it was executed. * Under such circumstances the written instrument must be the criterion by which the rights of the parties are to be determined."

In *Miller v. Lord*, 11 Pick., at p. 24, the court said: "It is true that the parties declare that they understood the agreement differently at the time it was made, but it does not appear that the construction which either party put on the agreement was made known to the other party until after the agreement was concluded; both parties therefore are bound by the terms of the agreement, and it is to be construed by the court."

It is said in Wharton's Law of Contracts, Vol. 1, section 207, on p. 300, that: "There can be no rectification, however, unless it is proved that both parties were mistaken in the use of the terms to be corrected, and that both parties agreed to the contract sought to be substituted for that to be set aside. In each term of the contract to be thus set up, it must be proved that the parties concurred. To a contract, concurrence of minds is essential, and no substitution of an amended contract can be made without showing that the parties concurred in the amended contract. This is what is meant by the expression frequently used,

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that to justify a decree of rectification concurrent mistake, or mistake of both parties, must be proved. On proof of mistake by one party, rescission may be decreed. But rectification will not be decreed without proving that both parties had originally agreed to the terms inserted, and that the mistake was bilateral. "The court cannot correct an instrument except upon a clear mistake common to all." "

In 2 Chitty on Cont. (11 Am. ed.), by Perkins, p. 1028, it is said: "Upon sufficient proof of the mistake and of the agreement really made, a court of equity exercises a jurisdiction to rectify the contract, and to enforce it in its corrected state. In the exercise of this jurisdiction a court of equity necessarily receives evidence of the real agreement in variation of the terms of the written agreement.

" "In the ordinary case of rectifying mistakes in an instrument where it is sought to alter the instrument in any prescribed or definite mode, the mistake must be the concurrent mistake of all the parties. In such cases it is necessary to prove not only that there has been a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really so intended; for in such case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument.' " *Ball v. Storie*, 1 Sim. & Stu. 210, 219; *Bently v. Mackay*, 31 L. J. C. 697, 709; *Murray v. Parker*, 19 Beav. 305, 308.

The rule is thus stated in Chitty's Contracts (12 Eng. ed.), at p. 864: "It has long been an established rule of equity, that where a contract has by reason of a mistake common to the contracting parties been drawn up to an effect militating against the intentions of both, the court will rectify the contract so as

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to carry out such intentions. It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. * * It is necessary for a plaintiff to show that there was an actually concluded contract which, is inaccurately represented to be the instrument purporting to be made in pursuance of it. 'Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.'" Seaton on Decrees, Vol. 2, pt. 1, p. 1342; *MacKenzie v. Coulson*, L. R. Eq. 8, 368; *Bentley v. Mackey*, *supra*.

Where a document has been signed as an agreement in a common mistake as to its contents, and it appears that no real agreement was come to between the parties according to which it might be rectified, the court will set it aside. *Calverley v. Williams*, 1 Ves. Jr. 210; *Price v. Ley*, 32 L. J. C. 530; *Fowler v. Scottish Life Ins. Soc.*, 28 L. J. C. 225; 2 Chitty on Cont. (11 Am. ed.), 1029; Leake on Cont. 175.

"Where neither party to the contract is in error as to the matters in respect of which they are contracting, and there is an actually concluded contract, but there is an error common to both the parties in the reduction of the contract into writing, there the court interferes for the purpose of reforming the contract." Fry on Specific Performance (3d Eng. ed.), section 766 (3d Am. ed.), section 754; Pomeroy on Cont., sections 248, 249; Waterman on Specific Performance, sections 368, 369.

It must be a mistake in reducing the actual agreement of the parties to writing. Waterman on Specific Performance, section 368.

"It follows, from the nature of the jurisdiction, that there can be no rectification where there is not a prior actual contract by which to rectify the written docu-

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ment." Fry on Specific Performance (3d Eng. ed.), section 791, p. 366 (3d Am. ed.), section 758, and notes on p. 397; *Wemple v. Stuart, supra*.

In *Murray v. Parker, supra*, Lord Romily, M. R., said: "In matters of mistake, the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases, the real agreement must be established by evidence, whether parol or written; * * if there be a previous agreement in writing, which is unambiguous, the deed will be reformed accordingly."

It is indispensable that the evidence should amount to proof of a mistake common to all the parties, a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed. *Bentley v. Mackay, supra*.

It was held by Lord Hardwicke, in *Henkle v. Royal Exch., etc., Co.*, 1 Ves. Sr. 318, that there must be clear proof of a real agreement of both parties different from the expressed agreement, and that a different intention or mistake of one party alone is no ground to vary the agreement expressed in writing.

In discussing these questions, the author of *Warvelle on Vendors* says (section 11, pp. 800, 801): "An action may be maintained in equity for the rescission of a contract upon the ground of mistake as to a material fact by one of the parties only, yet it must be evident that, if the minds of the parties to a contract did not meet, that if one understood the matter as expressed in the agreement and the other differently, there can be no reformation, from the very nature of things, because, nothing having been agreed upon in the minds of the parties, there is nothing to reform.

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Therefore, to authorize a reformation the misunderstanding must have been mutual; and a rectification will only be permitted where both parties have executed the instrument under a common mistake, and have done what neither of them intended. In every case, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon, and that the writing afterwards signed fails to be, as it was intended, an execution of such previous agreement, but on the contrary, expresses a different contract, and that this is the result of mutual mistake. But if there had been a misunderstanding between the parties during the negotiations, and if the parties understood the agreement differently, yet neither made known to the other his construction of it, and it is afterwards reduced to writing and duly executed, they are both bound, in equity as well as at law, by the terms of the written instrument.

“A party who files a bill to correct a mistake in a written agreement, in a case where the court has the power to make a correction therein, must not only state, in his bill, the agreement as it ought to have been reduced to writing, but also the substance of the written agreement itself. The party alleging the mistake holds the affirmative, and must satisfy the court beyond a reasonable doubt that the agreement, as he claims it to have been made, was in fact made between the parties, and that a mistake has occurred in reducing such agreement to writing.”

The appellant bank, however, insists that this court has decided that it was not necessary that there should have been a prior agreement, or even an expressed intention, citing *Calton v. Lewis*, 119 Ind. 181, at p. 183. In that case this court said: “It is an error to suppose that a written instrument can only be corrected where the mistake results from the omission or

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insertion of words different from those agreed upon, or contrary to the expressed intention of the parties. It is a mistake of fact when, through ignorance, inadvertence, negligence or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did. The inquiry in such a case must be, what was the subject of the contract, not what words were agreed upon as descriptive of the land. *Baker v. Pyatt*, 108 Ind. 61; *Keister v. Myers*, 115 Ind. 312."

In that case it was sought to reform the deed by inserting the name of the state in which the land was alleged to be situate. The language of the court was in response to the contention of counsel that the deed could only be corrected by showing that the name of the state had been agreed upon as a part of the description of the land, citing *Nelson v. Davis*, 40 Ind. 366; *Heavenridge v. Mondy*, 49 Ind. 434. The court correctly said that the question was "what was the subject of the contract, not what words were agreed upon as descriptive of the land." The contract referred to was not the deed, but the contract which preceded the deed and under which it was executed.

There is nothing in the special finding from which we can determine what real estate was the subject of the contract except the description in the mortgage itself.

It follows that the court erred in its first and third conclusions of law so far as the rights of appellant and the appellee bank were stated concerning their respective mortgages.

Said conclusions of law were erroneous for another reason. It will be observed that the court states in the first finding that Judy owned 565 acres of land in sections 23 and 24, and an undivided interest in 40 acres in section 20, while the cross-complaint alleges

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that he owned 325 acres in sections 23 and 24, and that the agreement made between appellee bank and Judy, that he, Judy, would give a mortgage of the aforesaid 325 acres in sections 23 and 24 and described in the cross-complaint to secure the notes held by the bank. The first conclusion of law is, that appellee bank is entitled to have its mortgage reformed so as to include all the real estate described in the first finding of the court, which is five hundred and sixty-five acres and an undivided interest in forty acres in section 20, notwithstanding the cross-complaint alleged that it was the agreement of the parties to the mortgage only to include 325 acres in sections 23 and 24, and made no mention of the interest of Judy in the forty acres in section 20.

The finding of the court, therefore, that Judy and the officers of the bank intended to include in said mortgage all the real estate described in the first finding was, as to the tract of forty acres in section 20 and the northwest quarter and west half of the northeast quarter of section 23, outside the issues in the cause. To the same extent the first conclusion of law was outside the issues in the case.

To the extent a special finding is outside the issues in a cause it is a nullity and can give no support to a conclusion of law thereon. *Burton, Rec., v. Morrow*, 133 Ind. 221, 226.

Appellant's mortgage conveyed Judy's interest in the forty-acre tract in section 20, and on the finding of the court, considered with respect to the issues in the cause, was the only mortgage on said tract, and the first lien thereon.

It follows that the court erred in its first and third conclusions of law in stating that appellee bank was entitled to have its mortgage reformed so as to include Judy's interest in said forty-acre tract, and that the

same, when reformed, was a first lien thereon. This error was carried into the final decree.

For the reasons given the cause must be reversed. On account of the discrepancies between the descriptions of the real estate in the cross-complaint and special finding and the final decree, we think justice will best be done by ordering a new trial of said cause.

The judgment is therefore reversed, with instructions to grant a new trial of said cause as to all the parties except Elizabeth Judy, and the judgment in her favor is affirmed.

MCCABE, J., took no part in the decision of this cause.

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[No. 17,973. Filed September 22, 1896: Rehearing denied Dec. 2, 1896.]

LICENSE. — Intoxicating Liquors. — Remonstrance. — Statute Construed.—Where an application is made to obtain a license to sell intoxicating liquors within the boundaries of an incorporated city, only the legal voters residing within the particular city ward in which such business is proposed to be conducted are authorized, under section 9 of an Act of March 11, 1895 (Acts 1895, p. 248), to join in a remonstrance against the granting of such license, and a majority of such voters will be required to defeat the application.

SAME. — Intoxicating Liquors. — Remonstrance. — Separate Remonstrance Must Be Directed Against Each Applicant. — Statute Construed.—Under section 9 of Act of March 11, 1895 (Acts 1895, p. 248), a remonstrance against the granting of a license to sell intoxicating liquors as provided for by said section applies to some particular applicant, and does not authorize persons remonstrating to join two or more applicants in the same remonstrance, but a separate remonstrance must be directed against each applicant.

SAME. — Intoxicating Liquors. — Remonstrance. — Number of Votes to Constitute a Majority. — Statute Construed.—The majority of voters as provided in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), required to sign a remonstrance against the granting of a license to sell intoxicating liquors is determined by the aggregate vote cast in the township for candidates for the highest office at the No-

146	350
146	871

146	350
156	17
156	204

146	350
156	590

146	350
159	502

146	350
160	8
160	377
160	617

146	350
161	499
162	96

146	350
165	123

146	350
f167	397
167	437
f167	438
167	439
168	21

146	350
f169	698

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vember election last preceding the filing of the remonstrance, where an application is made to conduct a saloon at some place in the township outside of the limits of an incorporated city; but when the applicant desires to obtain a license to operate a saloon in a ward of an incorporated city, then the majority of voters is determined by aggregating the vote of that particular ward as cast at the last general city election preceding the filing of the remonstrance, for the highest municipal office to be filled at such election.

SAME.—Intoxicating Liquors.—Remonstrance.—“Highest Office.”—Statute Construed.—The phrase “candidates for the highest office at the last election” as used in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), was intended by the legislature to mean the Governor, if a Governor was elected at the last State election preceding the filing of the remonstrance provided for in said section, if the applicant desired to obtain a license to sell in a township beyond the limits of an incorporated city; in the event a Governor was not elected at said election, then the votes cast for Secretary of State should be the standard. When the application is for a license to conduct a saloon in an incorporated city, a majority of the legal voters of the ward must be determined by the aggregate vote cast therein for mayor at the last preceding city election and in the event no mayor was elected at said election, then the majority must be determined in like manner by the vote cast in the ward for councilman.

STATUTORY CONSTRUCTION.—Where there is nothing in an act to indicate that a word or phrase is used in a particular or technical sense it will be interpreted in accordance with its ordinary and popular meaning at the time of the passage of the statute.

From the Gibson Circuit Court. *Reversed.*

L. C. Embree, for appellant.

M. W. Fields and *T. R. Paxton*, for appellees.

JORDAN, J.—Appellant was an applicant, at the regular March session, 1896, of the board of commissioners of the county of Gibson, for a license to sell intoxicating liquors in the Second ward in the city of Princeton, in said county.

A remonstrance in writing, under section 9 of an act of the legislature, approved March 11, 1895 (Acts 1895, p. 248), purporting to be signed by a majority of

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the legal voters of Patoka township, of said county, was filed with the county auditor, three days before the beginning of said regular session, whereby the remonstrators objected to the granting of a license to any applicant for the sale of spirituous, vinous, malt, or other intoxicating liquors, to be sold and drunk within the limits of said township, and also objected to the granting of such license to five specially mentioned applicants, including appellant. This remonstrance was sustained by the commissioners, and by virtue thereof a license was denied appellant, and upon an appeal and trial the circuit court found that said remonstrance was signed by a majority of the legal voters of said township of Patoka, and by reason thereof rendered a judgment dismissing the application at the cost of appellant. The principal errors assigned relate to the overruling of appellant's motion to strike out the remonstrance and in overruling his motion for a new trial.

The questions which the learned counsel for appellant urge upon us for consideration are:

1st. Is a remonstrance on the part of a majority of the legal voters of a township in which an incorporated city is situated sufficient, under the ninth section of the act in question, to defeat an application for a license to sell intoxicating liquors in a particular ward of said city?

2d. Does this section authorize two or more applicants to be joined and remonstrated against in the same remonstrance?

3d. What must be considered the highest office within the meaning of the last clause of section 9, and what election is meant or intended by said clause?

Section 9 of the act mentioned is as follows:

"If, three days before any regular session of the board of commissioners of any county a remonstrance

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in writing, signed by a majority of the legal voters of any township or ward in any city situated in said county shall be filed with the auditor of the county against the granting of a license to any applicant for the sale of spirituous, vinous, malt, or other intoxicating liquors under the law of the State of Indiana, with the privilege of allowing the same to be drunk on the premises where sold within the limits of said township, or city ward it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of the filing of such remonstrance. If any such license should be granted by said board during said period the same shall be null and void, and the holder thereof shall be liable for any sales of liquors made by him the same as if such sale were made without license. The number to constitute a majority of voters herein referred to shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance."

The language of the section is: "If, etc., a remonstrance in writing, signed by a majority of the legal voters of any township *or ward in any city*, etc., shall be filed, etc., against the granting of a license, etc., to any applicant for the sale of spirituous, etc., liquors * * * with the privilege of allowing the same to be drunk on the premises where sold, within the limits of said township *or city ward*, it shall be unlawful," etc. This section mentions but two districts wherein the will of a majority of the legal voters thereof can defeat the granting of a license, to-wit: 1st. A township, and 2d, a city ward.

Under the act of 1875, an applicant for a license is

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required to give twenty days notice to the citizens of the township, town, city, or ward in which he desires to sell his liquors, and the privilege is granted to any voter of the township wherein he desires to operate his saloon, to remonstrate for cause against the granting of such license. Burns' R. S. 1894, section 7278 (R. S. 1881, 5314). It is perfectly clear, from the language of section 9, of the act of 1895, when considered in connection with the provisions of section 7278 (5314), *supra*, that when an application is made to obtain a license to sell intoxicating liquors within the boundaries of an incorporated city, it must be for the privilege to conduct such business in some particular ward of that city. In such a case, it is only the legal voters residing within that particular city ward that are authorized, under section 9, *supra*, to join in the remonstrance against the granting of the desired license to the particular applicant, and a majority of such voters will defeat the application.

But where the application is made for a license to sell intoxicating liquors at some designated place in a township, but which place is beyond the limits of an incorporated city therein, then the law contemplates and requires that a majority of the legal voters of such township, residing anywhere therein, shall remonstrate in order to defeat such application. It follows then that, in the case at bar, the remonstrance in question should have been confined to the voters of the second ward of the city of Princeton, that being the particular district in which the appellant desired to conduct his saloon, and it was necessary to show that a majority of the voters residing therein had signed the remonstrance, in order to thereby prohibit the board of commissioners in the first instance, or the circuit court upon appeal, from granting a license to the appellant. The general rule is, that where per-

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sons exercise a right, under a statute, they must bring themselves within its provisions. The will of the number of voters intended and required by the section of the statute in question must, in each particular instance, be expressed against a license being granted to a particular applicant. There is nothing in the record, in the case at bar, disclosing that any voter of the second ward, of the city of Princeton, joined in the disputed remonstrance, and possibly all of the remonstrators may have been voters residing without the limits of that ward.

In the case of *State v. Gerhardt*, 145 Ind. 439, this court said: "We are of the opinion that the remonstrance, provided for by section 9, has application only to some particular applicant, and does not contemplate a general remonstrance, but one directed against each individual who desires to secure a license." We still adhere to this view of the law, and are of the opinion that under a reasonable construction of the statute, it must be held that it does not authorize persons remonstrating to join two or more applicants in the same remonstrance. From the language of the law we do not think that the legislature intended to authorize what might be termed a "blanket" remonstrance, covering all applicants for a license at the same session of the board of commissioners, but, upon the contrary, intended that there should be a separate remonstrance directed against each applicant. The fact is well recognized that there are persons in every community who are opposed to the traffic in ardent spirits, regardless of any legal restrictions imposed upon the sale thereof, or the required fitness, under the law, of the person desiring to engage in such business; while there are others who entertain views to the contrary, and do not object to a license for the sale of such liquors being granted to an applicant whom they

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deem, by reason of his good character, fit to be intrusted with such a permit, and who, as they believe, will conduct his business in accordance with the law. If the statute can be interpreted to permit the use of one joint remonstrance, embracing all applicants for a license, at the same session, including those who might measure up to the legal standard of fitness, with those who might fall below it, then this latter class of voters would be placed at a disadvantage, and might not be enabled, by joining in the remonstrance, to truly express their will as to all the applicants therein mentioned. The procedure of tacking, in a single remonstrance, one applicant on to another, might possibly result in doing an injustice both to the voters and also to the applicants, who were but exercising their legal rights to obtain a license. There is nothing in the statute to indicate that the legislature intended that a procedure, which might possibly result in an injustice, should be pursued.

All "maneuvering," "jockeying," or "log-rolling," in order to secure voters to sign a remonstrance, or to prevent them, if they so desire, from signing the same, ought to be condemned. The evident intention or policy of the law is, that the voters of the particular district may be permitted, without restraint or undue influence, to register their will against a liquor license being granted to an applicant therefor to sell his liquors in their midst.

We are next asked to give an interpretation to the following clause of section 9, namely: "The number of votes to constitute a majority of voters, herein referred to, shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance." Appellant raises a number of inquiries relative to the meaning of this clause,

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among which are the following: "Does it mean the last township or city election within the prescribed territory?" and, "What is the 'highest office' within the meaning of the statute?"

It is to be regretted that the legislature did not draft this law in such a manner that its meaning in every particular could not be questioned. All our State, county, and township elections, under existing laws, occur biennially at the same time, namely, on the first Tuesday after the first Monday in November. All city elections, in cities like Princeton, organized under the general laws of the State, are now also held biennially, on the first Tuesday in May. Acts of 1893, p. 50; Burns' R. S. 1894, section 3476. It is clear that where the application is made for a license to conduct a saloon at some place in the township outside of the limits of an incorporated city therein, that the majority of the voters of the township should be determined by the aggregate vote cast therein for candidates for the highest office at the November election last preceding the filing of the remonstrance, and that a majority of that vote must be deemed and held to be within the meaning of the law, a majority of all the legal voters of the township at the time of filing the remonstrance. In the event the applicant desires to obtain a license to operate a saloon in a ward of an incorporated city, whether incorporated and acting under the general laws of the State relating to the incorporation of cities, or otherwise, then the majority of the voters should be determined by aggregating the vote of that particular ward as cast therein at the last general city election preceding the filing of the remonstrance for candidates for the highest municipal office to be filled at said election.

The next inquiry is, what did the legislature mean by the phrase "for the highest office?" One of the

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same, when reformed, was a first lien thereon. This error was carried into the final decree.

For the reasons given the cause must be reversed. On account of the discrepancies between the descriptions of the real estate in the cross-complaint and special finding and the final decree, we think justice will best be done by ordering a new trial of said cause.

The judgment is therefore reversed, with instructions to grant a new trial of said cause as to all the parties except Elizabeth Judy, and the judgment in her favor is affirmed.

MCCABE, J., took no part in the decision of this cause.

MASSEY v. DUNLAP ET AL.

[No. 17,978. Filed September 22, 1896: Rehearing denied Dec. 2, 1896.]

LICENSE. — Intoxicating Liquors. — Remonstrance. — Statute Construed.—Where an application is made to obtain a license to sell intoxicating liquors within the boundaries of an incorporated city, only the legal voters residing within the particular city ward in which such business is proposed to be conducted are authorized, under section 9 of an Act of March 11, 1895 (Acts 1895, p. 248), to join in a remonstrance against the granting of such license, and a majority of such voters will be required to defeat the application.

SAME. — Intoxicating Liquors. — Remonstrance. — Separate Remonstrance Must Be Directed Against Each Applicant. — Statute Construed.—Under section 9 of Act of March 11, 1895 (Acts 1895, p. 248), a remonstrance against the granting of a license to sell intoxicating liquors as provided for by said section applies to some particular applicant, and does not authorize persons remonstrating to join two or more applicants in the same remonstrance, but a separate remonstrance must be directed against each applicant.

SAME. — Intoxicating Liquors. — Remonstrance. — Number of Votes to Constitute a Majority. — Statute Construed.—The majority of voters as provided in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), required to sign a remonstrance against the granting of a license to sell intoxicating liquors is determined by the aggregate vote cast in the township for candidates for the highest office at the No-

146	350
146	871
146	350
156	17
156	204
146	350
158	590
146	350
159	502
146	350
160	8
160	377
160	617
146	350
161	499
162	96
146	350
165	123
146	350
167	397
167	437
167	438
167	439
168	21
146	350
169	698

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vember election last preceding the filing of the remonstrance, where an application is made to conduct a saloon at some place in the township outside of the limits of an incorporated city; but when the applicant desires to obtain a license to operate a saloon in a ward of an incorporated city, then the majority of voters is determined by aggregating the vote of that particular ward as cast at the last general city election preceding the filing of the remonstrance, for the highest municipal office to be filled at such election.

SAME.—Intoxicating Liquors.—Remonstrance.—“Highest Office.”—Statute Construed.—The phrase “candidates for the highest office at the last election” as used in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), was intended by the legislature to mean the Governor, if a Governor was elected at the last State election preceding the filing of the remonstrance provided for in said section, if the applicant desired to obtain a license to sell in a township beyond the limits of an incorporated city; in the event a Governor was not elected at said election, then the votes cast for Secretary of State should be the standard. When the application is for a license to conduct a saloon in an incorporated city, a majority of the legal voters of the ward must be determined by the aggregate vote cast therein for mayor at the last preceding city election and in the event no mayor was elected at said election, then the majority must be determined in like manner by the vote cast in the ward for councilman.

STATUTORY CONSTRUCTION.—Where there is nothing in an act to indicate that a word or phrase is used in a particular or technical sense it will be interpreted in accordance with its ordinary and popular meaning at the time of the passage of the statute.

From the Gibson Circuit Court. *Reversed.*

L. C. Embree, for appellant.

M. W. Fields and *T. R. Paxton*, for appellees.

JORDAN, J.—Appellant was an applicant, at the regular March session, 1896, of the board of commissioners of the county of Gibson, for a license to sell intoxicating liquors in the Second ward in the city of Princeton, in said county.

A remonstrance in writing, under section 9 of an act of the legislature, approved March 11, 1895 (Acts 1895, p. 248), purporting to be signed by a majority of

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majority of the voters of that township should be determined by the whole number of votes cast by the electors of that township for the candidates for Governor at said last preceding election. In the event a Governor had not been elected, at said election, then it was intended that the aggregate vote cast in said township at said election for candidates for Secretary of State should be the standard by which the majority of the voters therein must be ascertained. As the judges of the Supreme Court are each elected for a term of six years, it would be possible for two successive elections to pass without the election of any member of that court; it is therefore evident, we think, that this office would not serve the purpose intended and is not within the meaning contemplated by the statute.

The mayor of a city is properly considered the highest official thereof; standing as he does at the head of the executive department of the municipal government, and that of councilman may be considered next in rank. It would follow, therefore, that where the application is for a license to sell intoxicating liquors in a ward of an incorporated city, a majority of the legal voters of the ward must be determined by the aggregate vote cast by the electors thereof for the candidates for mayor at the last preceding city election, and in the event no mayor was elected at said election, then the majority must be determined, in like manner, by the vote cast in the ward for candidates for councilman.

From the conclusions reached the contentions of appellant as to the errors alleged must be sustained.

The judgment is reversed at the cost of appellees, and the cause remanded, with instructions to the lower court to grant a new trial and sustain appellant's motion to strike out the remonstrance.

Sutton v. Baldwin.

SUTTON v. BALDWIN.

[No. 17,878. Filed December 8, 1896.]

146	361
153	510

146	361
159	41

146	361
162	389

PAYMENT.—*Bank Check.*—A check may be given and received, by agreement of the parties, as payment of a debt, and the debt for which it is so given is thereby extinguished, and if the check is not paid the right of action is on the check and not on the obligation or indebtedness for which it was given.

EXECUTION SALE.—*Estoppel.*—Where a sheriff received a check in payment for a deed issued under an execution sale of real estate, and thereby agreed to accept such check as so much cash, and further agreed to hold the check until next day in order that the purchaser, as a junior encumbrancer, might restrain payment to the execution creditor the amount of his said lien of such purchase-money, but the sheriff in violation of his said agreement transferred said check to plaintiff's attorney, informing him of the agreement to hold the check, and the purchaser next day, upon learning of the violation of the agreement made the night before, ordered the bank on which the check was drawn not to pay same, and such check was never returned or tendered to said purchaser, plaintiff by his conduct in receiving the check from the sheriff with a knowledge of the agreement, ratified the acts of the sheriff and is not entitled to the remedy provided by section 772, Burns' R. S. 1894 (760 R. S. 1881), for recovering judgment for the amount at which real estate is sold by the sheriff on execution.

TENDER.—*Money Deposited with Clerk of Court.*—Where, pending a trial, defendant deposits certain money in court to be returned to him on condition plaintiff surrenders to the clerk of the court defendant's check issued in payment of the debt in suit, the money and check to be held by the clerk subject to the order of the court, and such check is not surrendered, an order of court to return the money deposited is proper.

From the Cass Circuit Court. *Affirmed.*

McConnell & McConnell, G. W. Walters and G. C. Taber, for appellant.

D. P. Baldwin and McConnell & Jenkins, for appellee.

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MONKS, J.—This was a proceeding brought by the appellant, April 8, 1895, under section 772, Burns' R. S. 1894 (760, R. S. 1881), to recover judgment against appellee for the amount at which certain real estate was sold to him by the sheriff on execution, with interest and ten per cent. damages and costs, on the ground that he had failed and refused to pay the same. At appellant's request, the court made a special finding of facts and stated conclusions of law thereon, "that appellee had paid the amount of his bid before the commencement of this action, and that he is entitled to a judgment against appellant for costs," to which conclusions of law appellant excepted. Over appellant's motion for a new trial, judgment was rendered in favor of appellee.

It appears from the special findings, "that appellant, as a redemptioner from a former sale of the real estate in question, caused a *renditioni exponas* to be issued by the clerk of the Cass Circuit Court and to be placed in the hands of the sheriff of said county, and the sheriff thereupon advertised the land to be sold on said writ on the 25th day of February, 1895. On the day of sale, the land was struck off and declared sold to appellee for \$3,741.00, he being the highest bidder. The sheriff tendered a deed for said real estate to appellee, which he accepted and still retains; that at the time said deed was delivered appellee made out and delivered to said sheriff, in payment for his bid for said real estate, a check on the State National Bank of Logansport, Indiana, for \$3,741.00, payable to Charles W. Hornburg, or order, which check the sheriff then and there accepted from appellee in payment of his bid for said real estate. Appellee had that sum of money on deposit in said bank subject to check on said February 25 and 26, 1895; that immediately before the delivery of the sheriff's deed and the check,

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appellee stated to said sheriff and his deputy that at that hour of the night it would be impossible for him to pay the amount of his bid in cash, and inquired of said sheriff if he was willing to accept his check in lieu of the cash; and said sheriff then and there stated and agreed that he would accept said check in lieu of so much cash; that appellee further stated to said sheriff, before the delivery of either the deed or the check, that he claimed \$900.00 of the said \$3,741.00, as junior encumbrancer of said land, and informed said sheriff that he was about to commence a suit against him to enjoin the payment of said \$900.00 to appellant, and refused to deliver to him said check of \$3,741.00 unless said sheriff would agree to hold said check until 10:30 a. m. the next day, so that he, appellee, might restrain the payment of said \$900.00, to which the sheriff assented and agreed, and thereupon appellee delivered to said sheriff his check in the usual form on the State National Bank of Logansport, to the order of Charles W. Hornburg, and signed by appellee, for the sum of \$3,741.00, and received a sheriff's deed for said lands; that, on February 25, 1895, between 10 and 11 o'clock p. m. of said day, the sheriff indorsed and transferred said check of \$3,741.00 to the attorney for appellant, first informing him of said agreement made with appellee at 8:30 p. m. of said day, which check said attorney received for his client in payment of the judgment above set forth, both principal and costs; that said attorney, after receiving said check, paid to the sheriff with his personal check \$414.28, that being the costs upon the above described judgment and execution. The next day, February 26, 1895, at 9 o'clock a. m., appellee, after learning that the sheriff had violated his agreement made the night before, notified the cashier of the State National Bank of Logansport, not to pay said check, which order has

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never been withdrawn by the appellee; that the check has never been returned or tendered to appellee, but is still outstanding and retained by the appellant or his attorney."

The general rule is that a check delivered by a debtor to his creditor does not extinguish the debt for which it is given. If such check is paid, it extinguishes the debt, otherwise not. *Boyd v. Olvey*, 82 Ind. 294, 301; 2 Daniel on Negotiable Inst. 577; 2 Parsons on Cont. 622.

It is settled by the decisions of this court that the giving of a promissory note, governed by the law merchant, for a preexisting indebtedness of the maker to the payee will discharge such debt, unless it is shown that the parties did not intend it to have that effect. And the giving of a promissory note not governed by the law merchant for such a debt does not operate as a payment thereof, unless it is so agreed between the parties. *Smith v. Bettger*, 68 Ind. 254, and cases cited; 34 Am. Rep. 256; 18 Am. and Eng. Ency of Law, 178.

We think a check may be given and received by agreement of the parties as payment of a debt, and the debt for which it is so given is thereby extinguished. *Blair v. Wilson*, 28 Grat. (Va.) 165; *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *Lafayette, etc., Corp. v. Magoon*, 73 Wis. 627, 42 N. W. 17; *Turner v. Bank of Fox Lake*, 3 Keyes (N. Y.) 425. In such a case, if the check is not paid for any reason, the right of action is on the check and not on the obligation or indebtedness for which it was given. *Lafayette, etc., Corp. v. Magoon, supra*; *Blair v. Wilson, supra*.

It is insisted by appellant that the sheriff had no authority to receive anything but money in payment of the amount bid by appellee, and that he had no authority to accept the check as payment or make any agreement or promise in regard to said check.

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Under the facts stated in the special finding, appellant is not in a position to urge that the sheriff had no authority to receive the check in payment.

The special finding shows that the sheriff received the check in payment of the amount of appellee's bid. Appellant was not compelled to receive the check from the sheriff. He had the right to refuse it and demand the cash. He did not take this course, however, but elected to receive the check with a full knowledge of all the facts in regard to the agreement under which it was delivered to the sheriff. Moreover, the court finds that the attorney for appellant received the check for his client in payment of the judgment and paid the costs, amounting to \$414.28, and that the check has not been returned to appellee.

The facts found by the court show that appellant, besides receiving the check as a payment, had, by his conduct, ratified the acts and agreement of the sheriff in receiving said check in payment.

The contract to receive the check in payment was not rescinded or set aside by the act of appellee in notifying the bank not to pay said check. If appellant had offered to rescind the contract and tendered back the check when payment thereof was refused, a different question would be presented, but no such steps were taken. On the contrary, retaining a check which he received as a payment of the judgment, and without any offer to rescind the agreement under which it was received, he seeks to avail himself of the summary remedy provided by section 772 (760), *supra*.

Appellant is not entitled to the remedy provided by said section, for the reason that appellee has not, under the facts found, failed or neglected to pay the purchase-money.

As between appellant and appellee the check is an obligation to pay money, and a suit may be brought

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upon it. *Harrison, Rec., v. Wright*, 100 Ind. 515, 544; *Offutt v. Rucker*, 2 Ind. App. 350.

The record shows that during the progress of the trial, appellee paid into court "the amount of his bid, with interest, for the use of appellant in lieu of the check of appellee upon appellant surrendering said check to the clerk of the court, the money and check to be held by the clerk subject to the further order of the court, the money to be returned to said appellee by the clerk under the order of the court if the check was not surrendered to the clerk within a reasonable time, to be fixed by the court."

The check was not surrendered to the clerk, and afterwards, on order of court, the amount paid by the appellee into court was repaid to him. There was no error in this order of the court. The check not having been surrendered to the clerk it was proper for the court to order the money repaid to appellee. The payment of the money into court was only a conditional tender. Appellant was only entitled to demand that the money remain subject to the order of the court on complying with the conditions named by appellee. This he failed to do.

Judgment affirmed.

HARRISON v. STANTON ET AL.

[No. 17,877. Filed December 3, 1896.]

WILLS.—Contest Of.—Right to Prosecute Action as Poor Person.—If the right to prosecute an action as a poor person under section 260, R. S. 1881 (261 Burns' R. S. 1894), can be extended by construction to proceedings to contest a will after the probate thereof, under sections 2596, 2597, R. S. 1881 (2766, 2767, Burns' R. S. 1894), the contestant would not, by reason thereof, be relieved from giving bond as required by sections 2596, 2597, (2766, 2767), *supra*.

146	366
152	693
146	366
153	391
146	366
157	185
146	366
161	498
146	366
164	664
146	366
166	206

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From the Marion Circuit Court. *Affirmed.*

J. E. Watson, R. W. McBride, C. S. Denny, Wilson Morrow, J. F. McKee and W. N. Pickerill, for appellant.

J. E. Scott and Miller, Winter & Elam, for appellees.

JORDAN, C. J.—Appellant, on the 18th day of October, 1895, instituted this proceeding, under sections 2766 and 2767, Burns' R. S. 1894 (2596, and 2597, R. S. 1881), to contest the validity of the will of John Herron, who died a resident of Marion county, Indiana, leaving an estate of the probable value of \$200,000.00. The will in contest was admitted to probate on May 17, 1895, in the circuit court of Marion county, Indiana. At the time of the filing of her complaint the appellant also petitioned the court to allow her to prosecute this suit as a poor person, basing her right on section 261, of Burns' R. S. 1894 (260, R. S. 1881), being section 17, of the code of 1881, which reads as follows:

“Any poor person, not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person.”

By her verified petition it appeared that she was a poor person, destitute of means, and unable to procure any responsible person to become her surety on the

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bond required to be filed by section 2767 (2597), *supra*. She supported the facts set forth in her petition by the affidavits of other persons, and also showed by the affidavits of two reputable attorneys at law that she, in their opinion, had a meritorious cause of action, etc. Pending her application for leave to sue *in forma pauperis*, appellee, Stanton, executor of the will, moved the court to dismiss the action, for the reason that no bond had been filed, as required by the section above mentioned. The court denied appellant's application for leave to prosecute her contest proceeding as a poor person, and ordered that she file a bond within thirty days. Upon failure to file the required bond within the limit fixed, the court sustained appellee's motion and dismissed the proceeding at appellant's cost, and upon this action of the court appellant bases her alleged error.

Assuming, without deciding, that the right to sue *in forma pauperis*, as granted by section 261 (260), *supra*, can be, as appellant insists, extended by construction, to the proceedings to contest a will, under the statute relating to wills, we must next inquire, could such leave, if granted by the court in pursuance of the section of the civil code, be held in any manner to have the force or effect to dispense with the bond in question, and thereby relieve the appellant of the imperative obligation of filing one, as imposed by the statute, upon a person seeking to annul a will after the probate thereof? If this question can be answered in the negative, it would follow that the court properly dismissed the proceeding upon the failure of appellant to file the requisite bond, and its action must be affirmed.

The insistence of appellant's learned counsel is that the provisions of section 261 (260), *supra*, ought to be imported by construction into section 2767 (2597),

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supra, and ingrafted onto it as an exception to the extent of relieving a poor person contesting a will from the necessity of filing a bond. A solution of the question involved, requires an examination, to an extent, of the statute relating to the execution, probate and contest of wills. By section 38, of this act, being section 2765, Burns' R. S. 1894 (2595, R. S. 1881), the right is given to resist the probate of a will, without giving a bond. Section 39, being section 2766 (2596), *supra*, provides as follows:

"Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto."

This latter section, it seems, is intended to apply to persons who have not resisted the probate or assailed the validity of a will under section 2765 (2595), *supra*. *Duckworth v. Hibbs*, 38 Ind. 78.

Section 2767 (2597), *supra*, being the one more especially in controversy, reads as follows:

"Before any proceedings shall be had on an application to contest a will after probate thereof, the person making the same, or some other person in his behalf, shall file a bond, with sufficient sureties, in such amount as shall be approved by the clerk of such circuit court, conditioned for the due prosecution of such

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proceedings and for the payment of all costs thereon in case judgment be awarded against him."

The right, as it now exists in this State, to resist the probate of a will, or to contest its validity, is purely statutory, and such remedy or right is a special proceeding provided by statute. *Harris v. Harris*, 61 Ind. 117; *Deig, Exr., v. Morehead*, 110 Ind. 451; *McDonald v. McDonald*, 142 Ind. 55.

Under section 2765 (2595), *supra*, this right may be exercised without the complainant being required to file a bond, but after the will has been once admitted to probate the right to attack its validity upon any or all of the grounds mentioned in section 2766 (2596), *supra*, is coupled with and given only upon the stipulated condition that a bond be filed for *the due prosecution of such proceeding*, and for the payment of all cost in case judgment be awarded against the contesting party. While the filing of this required obligation, within the meaning and terms of the section in question, cannot be said to be a condition precedent to the commencement of the suit, however, after it is once instituted, the statute denies the authority or power of the court to further proceed in the action, in the absence of the filing of the prescribed bond. It is true that the court, in its discretion, may allow a reasonable time to the plaintiff to secure and file the bond, nevertheless, upon his failure to file one, the court must dismiss the proceeding. *Burns, Exr., v. Travis*, 117 Ind. 44; *Lange v. Dammier*, 119 Ind. 567.

The fact that a person seeking to avail himself or herself of the statutory right to contest a will after its probate, is poor and destitute of means, cannot exempt him or her from the imperative demands of the statute. It is a general rule that a person asking a right or remedy conferred by the statute, must bring himself substantially within the provisions or require-

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ments of the statute conferring such right. *Goodwin v. Smith*, 72 Ind. 113; *Massey v. Dunlap*, ante, 350; Sutherland on Statutory Construction, section 393.

The legislature, in the enactment of the statute relative to contests of wills, seems to have given and extended the right or remedy to annul a will thereunder equally to all persons, without regard to their *status* as to wealth or poverty. This statutory remedy can only be made available to those who substantially comply with the conditions or directions of the statute, it can not be enlarged nor changed by construction to conform it to some particular case. Sutherland on Stat. Cons., sections 392 and 456; *Willett v. Porter*, 42 Ind. 250.

The common law did not authorize anyone to sue *in forma pauperis*, and it was only in pursuance of the provisions of Statute 11, of Henry VII, c. 12, that a plaintiff who was a pauper could be admitted to sue as a poor person. Tidd's Practice, 97. And by Statute 23, Henry VIII, c. 15, such person was exempt from the payment of cost to the defendant in an action of debt in the event he was nonsuited or had a verdict returned against him, but he might be subjected to such other punishment as the justices before whom the action was pending might deem reasonable. (Id. 97 and 98.) While the privilege granted to a poor person is just and proper, still it is not to be extended by construction beyond its true scope and purpose. *Hoey v. McCarthy*, 124 Ind. 464.

Appellant, however, insists that the court should so construe section 261 (260), *supra*, as to make it control the requirement of section 2767 (2597), *supra*, and hold that under the provisions of the former she could be relieved from filing the bond provided by the latter. The question with which we have to deal, under the facts in this case, is not one of judicial discretion, but

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is one relative to the existence of a remedy or right of purely statutory character. This right, we have seen, is made to depend upon the condition, that a bond be given, not only to secure the payment of cost, but also to secure the *due prosecution of the proceeding*. Were we to yield to the insistence of appellant, we would have to eliminate from the statute a feature imposed by the legislature as an essential condition upon the right conferred, and one which limits the very power of the court to proceed in an action instituted to annul a will. This would be judicial legislation instead of judicial construction.

In *The State, ex rel., v. Delano*, 37 Ind. 249, the relator, who was a poor person, was defeated in his action upon the official bond of a constable before a justice of the peace. He applied to the common pleas court for an order to prosecute his action therein upon an appeal as a poor person. The court ordered that a transcript of the proceedings before the justice be certified, and that the relator be allowed to prosecute his cause as a poor person. Subsequently, the appeal was dismissed by the court for the reason that no appeal bond was filed.

This court, by Worden, C. J., in construing the above section of the code providing for the prosecution or defense of suits by poor persons, said: "This statute does not, as we think, dispense with a bond. It simply provides the party with attorneys and other officers requisite for the prosecution or defense of his suit, who are to serve him without fee or reward. It does not furnish officers or witnesses to serve the other party without fee or reward; and if the opposite party recover in the action, he is entitled to recover his costs of the poor person. The poor person is not exempt from the payment of whatever judgment the other party may recover against him, whether for costs or

otherwise; and this he is required to do by the conditions of the appeal bond.”

If the section of the code in question cannot exempt a poor person from giving an appeal bond, upon which his right to an appeal from a justice of the peace depends, with equal force and reason, at least, it may be said, that it cannot be construed so as to exempt him from filing a bond upon which his statutory right to contest a will also depends. The cases cited by counsel for appellant cannot be held to be controlling upon the question here involved.

This court, in the cases of *Hood v. Pearson*, 67 Ind. 368, and *Britton v. Rowe*, 115 Ind. 55, affirmed the right of an infant to prosecute as a poor person without the intervention of a next friend.

In *Wright v. McLarinan*, 92 Ind. 103, and in *Fuller v. Mehl*, 134 Ind. 60, it was held that a non-resident, who had been permitted to prosecute as a poor person, was relieved from giving a cost bond, required of non-residents, by another provision of the civil code.

In the cases last cited the right of action in each existed independently of the provisions or requirements of the code, consequently it was held that the right granted to him under section 261 (260), *supra*, operated as an exemption from the obligations required by the other provisions of the code. The court seems to have considered these provisions as restrictions only upon the manner of enforcing such a right of action by a particular party, and construed them in connection and with reference to the meaning and intent of the legislature in awarding, by another section of the code, the right to prosecute as a poor person. The restrictions or limitations which were under consideration in these cases were not conditions upon which the right or remedy of the party rested. To grant a statutory remedy upon a condition with which

The Baltimore and Ohio Southwestern Railway Company v. Young.

both the rich and poor alike must comply when they attempt to exercise such right, is a matter wholly within the province of the legislature, and if the remedy is conditioned upon a bond being given, and for this reason, it can be said to work an injustice or hardship upon the poor suitor, our answer to this contention must be "*ita lex scripta est*"—the law is so written, and must be accepted and applied by the court as enacted.

It follows that the action of the lower court in dismissing the contest proceeding in the absence of the required bond was right, and its judgment is therefore affirmed.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY
COMPANY v. YOUNG.

[No. 17,981. Filed December 4, 1896.]

PLEADING.—Complaint.—Necessary Allegations in Action for Negligence.—A complaint for negligence to be sufficient, must allege the negligence of the defendant and the freedom of the plaintiff from negligence.

SAME.—Proximate Cause.—Complaint.—Sufficiency Of.—To constitute a good complaint in an action for negligence, it must affirmatively appear from the facts pleaded that the negligence of the defendant was the proximate cause of the injury.

RAILROAD CROSSING.—Failure to Give Signals at Crossing.—Collision.—Proximate Cause.—Sufficiency of Complaint.—A complaint, for personal injuries received at a railroad crossing by reason of the failure of defendant to give signals, which fails to allege that plaintiff could have heard the signals if given, or that if he had heard them before going upon the track he could have avoided the collision, is bad for its failure to allege that the injury was due to the omission of defendant to give signals.

From the Sullivan Circuit Court. *Reversed.*

W. H. DeWolf, W. R. Gardiner, J. T. Hays, and E. W. Strong, for appellant.

Geo. G. Reily and J. W. Emison, for appellee.

146 374
147 39

146 374
149 526

146 374
153 164

146 374
156 372

146 374
159 562

146 374
164 191

146 374
f166 266
f166 671

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HACKNEY, J.—The appellee sued and recovered for personal injuries sustained by him in a collision of a train with his wagon at the crossing of a highway and the railway of the then Ohio & Mississippi Railway Company, since consolidated with other companies, and constituting the appellant.

The complaint alleged that the crossing was upon a sharp descending grade, and the railway for a half mile north of the crossing ran through a cut thirty feet deep; that two hundred feet east of the highway and within twenty feet of the railway was a large, tall frame building which obstructed a view to the railway by persons upon the highway approaching the crossing towards the east; that the highway for the distance of a quarter of a mile before reaching the crossing, as he was going, was much lower than the railway at the crossing; that by reason of said conditions a train approaching said crossing from the northeast could not be seen within a quarter of a mile of said crossing, nor until the intersection was reached by one traveling in the direction in which the appellee was driving. It was alleged that the appellee was familiar with the regular time of trains upon the road; that as he approached the crossing it was not the time for a train at that point, and he had no notice or knowledge that a train would then pass said crossing; that "as he was carefully and prudently driving along said highway * * * approaching said railway at said crossing, he listened and looked carefully for a train, but heard none; that no bell was rung nor whistle blown, nor signal of any kind given, and he drove along said highway and upon said crossing at the place aforesaid, whereupon a long heavy passenger train of cars, running at the rate of sixty miles an hour, without any notice of warning as aforesaid, ran against and upon him, in his wagon," inflicting

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the injuries complained of, "through no fault or negligence on his part."

The appellant insists that its demurrer to the complaint should have been sustained, and the contention is now made that it was insufficient in its allegations of negligence and of the absence of contributory negligence on the part of the appellee, and that it failed to allege facts disclosing that the negligence of the company was the proximate cause of the injury.

It is the general rule in actions for negligence, and it is the rule in cases of the character of the present, that at least three propositions must concur before a liability arises: negligence on the part of the defendant, such negligence is the proximate cause of the injury complained of, and the negligence of the person injured does not contribute to the injury. *Cincinnati, etc., R. W. Co. v. Duncan, Admr.*, 143 Ind. 524; *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449; *Faris v. Hoberg*, 134 Ind. 269; 16 Am. and Eng. Ency. of Law, p. 422; Elliott on Railroads, sections 1155, 1156; *Pittsburg, etc., R. W. Co. v. Conn*, 104 Ind. 64; *Corporation, etc., v. Mathews*, 92 Ind. 213; *Ohio, etc., R. W. Co. v. Engrer*, 4 Ind. App. 261; *Peerless, etc., Co. v. Wray*, 10 Ind. App. 324; *Chicago, etc., R. R. Co. v. McKean*, 40 Ill. 218; *Cosgrove v. New York, etc., R. W. Co.*, 13 Hun. 329; *Barringer v. New York, etc., R. R. Co.*, 18 Hun. 398.

It has been so many times held that a complaint for negligence, to be sufficient, must allege the negligence of the defendant and the freedom of the plaintiff from negligence, that we need not cite authority upon the question of pleading, with reference to these two elements. We are not impressed with the claim that with reference to these two elements of the case the complaint is insufficient. The allegations of failure to give signals of the approach of the train to the

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crossing of the highway are sufficient, we have no doubt, to disclose the violation of a duty expressly enjoined by statute. Burns' R. S. 1894, sections 5307, 5308 (R. S. 1881, 4020, 4021).

The general allegation of freedom from fault on the part of the appellee has always been held sufficient in this State. The cases holding this rule have been fully collected in a note to Vol. 5, Ency. Pl. and Pr., p. 7. Nor do we agree with counsel for the appellant that the particular allegations as to the care exercised by the appellee are at variance with the general allegation of freedom from negligence. We may suggest, however, that if the sufficiency of the complaint rested upon the particular allegations of care on his part it would be very doubtful if it would be sufficient. As to the essential element of liability that the negligence of the defendant shall be the proximate cause of the injury, it has been specially held, as a question of pleading, that the fact must affirmatively appear to constitute a good complaint. *Pittsburg, etc., R. W. Co. v. Conn, supra; Corporation, etc., v. Mathews, supra; Ohio, etc., R. W. Co. v. Engrer, supra; Peerless, etc., Co. v. Wray supra; Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Evansville, etc., R. R. Co. v. Krapf, Admr.*, 143 Ind. 647.

With reference to this element of liability, it is said, in *Elliott on Railroads, supra*: "The rule supported, we think, by the weight of authority is that one who violates the law is a wrongdoer, that ordinarily, the omission of the statutory duty is negligence *per se*, and that where the omission is established, such negligence arises as a matter of law, but such omission by no means conclusively establishes the company's liability, for the injured party must have been free from fault, and the negligence of the company must have been the proximate cause of his injury in order

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to enable him to recover," citing many authorities. Again it is said, in the same section: "In no event is the omission to give the statutory signals sufficient of itself to make out a case, for there must be evidence showing that it was the proximate cause of the injury."

In the complaint before us there is no allegation supplying this element of the liability sought to be enforced. To hold the complaint sufficient we would be required to infer from the alleged negligence of the company, the generally alleged care of the appellee, and his injury from the collision that the company's negligence was the cause of the injury. Such an inference does not necessarily arise from the facts mentioned. Like facts were alleged in *Pittsburg, etc., R. W. Co. v. Conn, supra*, and this court refused to draw this inference, and in *Pennsylvania Co. v. Gallentine, supra*, the complaint was held to be insufficient because it failed to show "that the injury was caused by, or resulted from, the negligence of the defendant."

In *Chicago, etc., R. W. Co. v. McKean, supra*, it was said of a statute requiring signals at crossings, similar to our statute, *supra*, that "It is very evident the legislature did not intend to declare, nor have they so declared, that this omission of duty shall, *per se*, render them liable to damages for injuries. The injury must be shown, by circumstances at least, to have been the consequence of, or caused by, such neglect."

In *Barringer v. New York, etc., R. W. Co., supra*, and in *Cosgrove v. New York, etc., R. W. Co., supra*, it was held that the failure to give signals, the injury of the party and his freedom from negligence did not justify a recovery if the collision was from his inability to control his horse. It is said: "In such case the plaintiff cannot recover, not because the deceased was guilty of contributive negligence, but simply because

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his death was not caused by the negligence of the defendant."

In *Evansville, etc., R. W. Co. v. Krapf, supra*, a complaint for negligence was held bad for a failure to allege facts from which it could be inferred that the injury would not have happened but for the negligence of the defendant.

Under the rule in that case, the complaint before us is bad. There is no allegation that the appellee could have heard the signals if given, nor that he could have avoided the collision if he had heard them before going upon the track. There is not even the general statement that the collision or injury was due to the omission of the company to give signals. We are not here dealing with the manner in which the fact should be alleged, but the question decided is that the complaint has no allegation of fact requiring the inference that the alleged negligence of the company was the proximate cause of the injury.

The lower court, therefore, erred in overruling said demurrer, and the judgment is reversed, with instructions to sustain said demurrer.

STOUT v. RAYL ET AL.

[No. 18,087. Filed December 4, 1896.]

DEEDS.—Validity Of.—Delivery to Third Person for Benefit of Grantee.—Where, after the execution of a deed, the grantor handed the deed to his wife saying, "take it and keep it in a safe place until my death, then deliver it to B. F. Wells," endorsed on the deed were the words "after my death this deed to be delivered by B. F. Wells," and the wife kept the deed as directed, and at the death of grantor delivered same to B. F. Wells, who, after having it recorded, delivered it to grantee, such deed is not invalid as an attempt by grantor to make a testamentary disposition of the land without the legal formalities of a will.

146	379
155	358
146	379
157	226
157	431
146	379
161	65

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SAME.—Delivery.—Where a grantor executes a deed, reserving no right to recall the deed or alter its provisions, and delivers it to a third person to hold until his death and then deliver same to grantee, the delivery thereof as directed constitutes an effectual legal delivery, and on the death of grantor the grantee succeeds to the title.

APPEAL AND ERROR.—Evidence.—Objections to the admission of evidence not stated at the time it is objected to cannot be urged on appeal.

From the Hamilton Circuit Court. *Affirmed.*

J. F. Neal and *S. D. Stuart*, for appellant.

Christian & Christian and *Jesse E. Hodgins*, for appellees.

MCCABE, J.—The errors assigned on this appeal call in question the conclusions of law stated on the special finding of facts by the circuit court, and the action of that court in overruling the plaintiff's motion for a new trial. The substance of the special finding is as follows:

1st. That Robert Stout died intestate on June 18, 1895, leaving surviving him as his only heirs at law the defendant, Jemima Stout, his widow, Lucius Stout, Mary Ann Allen and Andrew P. Stout, his children.

2d. That on the 22d day of October, 1881, Robert Stout, by warranty deed, his wife, Jemima, joining therein, conveyed to the defendant, Mary Rayl, certain described real estate, situate in Hamilton county, Indiana, containing sixty acres. Said deed was duly acknowledged on said day before a justice of the peace; that thereafter, on said day, said deed was handed to the defendant, Jemima Stout, by said Robert Stout, he saying to her, "take it and keep it in a safe place until my death, then deliver it to B. F. Wells;" that said Jemima Stout took said deed and put it in a drawer, which was a safe place, and kept possession of it there under lock and key until the death of said

Stout v. Rayl *et al.*

Robert Stout, whereupon she delivered said deed to said B. F. Wells; that said deed on the day of its execution was put into an envelope by said Robert Stout and sealed up, and there were indorsed on said envelope the words: "Deeds to be delivered by B. F. Wells after my death," and there were indorsed on said deed the words: "After my death this deed to be delivered by B. F. Wells;" that said B. F. Wells, pursuant to the instructions given him by Robert Stout in his life time, called for and received said deed after the death of said Robert Stout, from the defendant, Jemima Stout, and caused the same to be recorded in the deed records of the county; and after said deed had been so recorded he delivered it to the defendant, Mary Rayl, who accepted the same and went into possession of said real estate.

3d. That on February 9, 1884, said Robert Stout, by warranty deed, his wife, Jemima Stout, joining therein, conveyed to the defendant, Mary Rayl, certain other described real estate, situate in the county of Hamilton, and State of Indiana, containing twenty acres, more or less; that said deed was duly acknowledged before a justice; that on said day after said deed had been duly signed and acknowledged, said Robert Stout handed said deed to the said defendant, Jemima Stout, saying to her: "Take it and keep it in a safe place until after my death, then deliver it to B. F. Wells;" that said Jemima Stout took said deed and put it in a drawer, which was a safe place, and kept possession of it there under lock and key until the death of said Robert Stout; that thereupon she delivered said deed to B. F. Wells; that said deed on the day of its execution was put into an envelope and sealed up, and there was endorsed on said envelope this language: "Deeds to be delivered by B. F. Wells after my death;" and there was endorsed on said deed

Stout v. Rayl et al.

this language: "To be delivered by B. F. Wells," and that said B. F. Wells, pursuant to the instructions given him by Robert Stout in his life time, called for and received said deed after the death of said Robert Stout, from the defendant, Jemima Stout, and had the same recorded in the deed records of the county, and thereafter delivered it to said defendant, Mary Rayl, who accepted the same and went into possession of said real estate.

4th. That said Robert Stout, deceased, at no time after the execution of either of said deeds and placing them in the hands of said Jemima Stout, ever exercised any control or authority over them, or ever called for them.

5th. That said Robert Stout, during his life time, exercised full control over said real estate and received the rents and profits therefrom and paid the taxes thereon, and that his personal property left by him is sufficient to pay his debts.

5½. That at the time of signing each of said deeds before said justice, said Robert Stout directed his wife to take charge of them and not let his body get cold in death before delivering them to B. F. Wells; that she accordingly took sole charge of said deeds and put them under lock and key in a drawer where she and said Robert kept their private papers. While he had access to said drawer by obtaining the key from her, he never had or resumed control of said deeds, or the other deeds to his children, but left them in the possession of his said wife. Frequently, prior to his death, and after making said deeds, he had conversations with said B. F. Wells, in which he directed him to deliver the deeds after his death to the grantees, and said Wells did so deliver them, but he never saw or had possession of them until they were delivered to him by Mrs. Stout.

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6th. That said defendant, Mary Rayl, since the death of said Robert Stout, has had possession of said real estate, and paid the taxes thereon and received the rents and profits therefrom of the value of \$——.

7th. That at the same time said first deed was signed and acknowledged by said Robert Stout and Jemima Stout, his wife, to Mary Rayl, said Robert and wife conveyed to plaintiff, Andrew P. Stout, a certain tract of real estate, situate in said county and State, and also conveyed to each of the defendants by separate deeds, a certain tract of real estate, situate in said county and State, each of which said deeds was placed in the envelope in which said first deed to Mary Rayl, herein mentioned, was placed, and each of said deeds was handed to said defendant, Jemima Stout, by said Robert Stout, saying to her: "Take it and keep it in a safe place until my death, and then deliver it to B. F. Wells;" that said Jemima Stout took each of said deeds and put them in a drawer, which was a safe place, and kept possession of each of them there under lock and key until the death of said Robert; that on the death of said Robert Stout she delivered each of said deeds to said B. F. Wells; that there was indorsed on each of said deeds this language: "To be delivered by B. F. Wells," and there was indorsed upon said envelope this language: "Deeds to be delivered by B. F. Wells;" that said B. F. Wells, after the death of Robert Stout, called for and received each of said deeds from the defendant, Jemima Stout, and had each of them recorded in the deed records in Hamilton county, and afterwards delivered them respectively to Andrew P. Stout, Jemima Stout and L. R. Stout, each of whom accepted the deed so delivered and took possession of the real estate described therein, and are now, and ever since have been in possession thereof; that said Mary Rayl had lived in said

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Stout's family twenty-eight years prior to his death, and he adopted the plan of dividing his real estate by deed, as above found, instead of by will or otherwise, which plan was, after his death, ratified, adopted and acted upon by his heirs as well as said Mary. The conclusion of law was that: Upon the foregoing facts the court concludes the law to be with the defendants, and that the plaintiff take nothing by his complaint and pay the costs, to each of which conclusions of law the plaintiff excepted.

The complaint sought to set aside said deeds to Mary Rayl, and to quiet plaintiff's alleged title in and to the undivided one-third of two-thirds of said real estate, as one of the children and heirs of Robert Stout, deceased.

It is contended that the conclusion of law stated by the circuit court is wrong because, as is claimed, first, that the facts found show that there never was a legal delivery of the deeds, and second, that the transaction was an attempt on the part of the grantor to make a testamentary disposition of his property by deed, and without the legal formalities of a will.

The cases of *Stewart v. Weed*, 11 Ind. 92, and *Squires v. Summers*, 85 Ind. 252, are very similar in their facts to the case at bar, and the conclusion there reached fully supports the conclusion of law stated in the present case. In the latter case it was said, on pages 253-4: "The deed was executed and duly acknowledged by Richard [Summers], Sr., and Paulina, his wife, in the presence of Thomas Sutton, the justice who took the acknowledgment, and Aaron Summers, husband of the grantee, Mary Summers; the other grantees were Richard Summers, Jr., and Thomas Summers. After the deed was signed and acknowledged, the justice handed it to Richard Summers, Sr., who handed it to Aaron Summers, the hus-

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band of one of the grantees, saying, 'Take it and give it to some one to keep while I live, then to be recorded.' Aaron took the deed, saying to Richard, Sr., 'I will give it to Paulina.' Richard, Sr., then said to her, 'Take it and put it away in the drawer, and take care of it until I die; then it is to be recorded.' * * After the execution of the deed Richard, Sr., expressed dissatisfaction with the deed, and asked Paulina where it was; when told that it was in the drawer, he said that 'they had forfeited it; that it had never been delivered, and that, if it had been, the other children could have it set aside; and that, as soon as he got able, he would go to town, and have a deed made to suit him.' This he said in the presence and hearing of Thomas Summers, one of the grantees. Upon these facts, there was no error in the conclusion of the court that the title to the land therein conveyed was vested in the grantees. * * * When a deed is delivered to a third person for the use of the grantee, the deed will take effect from the instant of such delivery, if the grantor parts with all control over the instrument. *Stewart v. Weed*, 11 Ind. 92." To the same effect is *Wilson v. Carrico*, 140 Ind. 533; *Dinwiddie v. Smith*, 141 Ind. 318; *Smiley v. Smiley*, 114 Ind. 258.

Mr. Washburn, in his work on real property (5th ed.), Vol. 3, at pages 319, 320, states the law thus: "Whether putting a deed into a third person's hands is a present delivery, or an *escrow*, depends upon the *intent* of the parties. If the delivery depends upon the performance of a *condition*, it is an *escrow*; otherwise it is a *present grant*, though it be to wait the lapse of time, or happening of an event. If it is to be delivered at the grantor's death, it is a present deed; and a quit-claim by the grantee, intermediate, would pass his estate."

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An eminent author correctly and clearly states the law thus: "Where a grantor executes a deed and delivers it to a third person to hold until the death of the grantor, the latter parting with all dominion over it and reserving no right to recall the deed or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee on the death of the grantor succeeds to the title. A delivery of this kind may be considered in effect an *escrow*, but differs from that in the fact that a delivery in *escrow* is dependent upon the performance of some event, and not upon the lapse of time." Devlin on Deeds, Vol. 1, section 280.

It is equally clear that the transaction did not constitute an attempt to make a testamentary disposition of the land by the grantor in the deeds in question. *Owen v. Williams*, 114 Ind. 179.

Objection is urged to the admission of the testimony of Jemima Stout as to the directions given by her husband as to what she should do with the deeds. The objection now urged to that testimony is, that it does not appear therefrom that these directions were given at the time the deeds were deposited with her. But no such objection was stated at the time the admission of the testimony was objected to. It has often been decided by this court that objections to the admission of evidence not stated at the time it is objected to can not be urged here on appeal.

The objection that such testimony was not part of the *res gestae* was made, but the court, in admitting the evidence, expressly stated that it was admitted as a part of the act of delivery. If these directions were in fact given at a different time than that of the delivery of the deeds, and thereby rendered incompetent, it was in the power of appellant to have so shown by a proper question to the witness; and then

Sibert *et al.* v. Copeland *et al.*

he might have moved to strike out the testimony. He fails to make the error alleged appear by the record, and hence he cannot secure a reversal therefor. Errors which the complaining party fails to make appear affirmatively by the record are not errors so far as such record is concerned.

There is no foundation for appellant's claim that the special finding is not supported by the evidence.

The circuit court did not err in its conclusions of law and in overruling appellant's motion for a new trial.

The judgment is affirmed.

SIBERT ET AL. v. COPELAND ET AL.

[No. 17,697. Filed June 9, 1896. Rehearing denied Dec. 4, 1896.]

146	387
150	585
146	887
155	311

APPEAL AND ERROR.—*Joint Assignment of Errors.*—An assignment of errors as follows: "The appellants severally aver that there is error," etc., setting out three alleged errors, is a joint assignment, the word "severally" applying to the specifications of error and not to the appellants.

146	387
166	144
1168	365

From the Fulton Circuit Court. *Affirmed.*

Conner, Rowley & McMahan, for appellants.

Enoch Myers and Borders & Borders, for appellees.

JORDAN, J.—This was an action in the lower court by the appellee upon a promissory note, executed by the appellants, Albert B. Sibert and Augustus H. Swearington, and to set aside an alleged fraudulent conveyance as against appellants, Clara H. and Albert B. Sibert, who are husband and wife. Other causes against the same parties by other plaintiffs were consolidated with this case in the lower court, and are embraced in this appeal. Upon a trial had,

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SAME.—Delivery.—Where a grantor executes a deed, reserving no right to recall the deed or alter its provisions, and delivers it to a third person to hold until his death and then deliver same to grantee, the delivery thereof as directed constitutes an effectual legal delivery, and on the death of grantor the grantee succeeds to the title.

APPEAL AND ERROR.—Evidence.—Objections to the admission of evidence not stated at the time it is objected to cannot be urged on appeal.

From the Hamilton Circuit Court. *Affirmed.*

J. F. Neal and *S. D. Stuart*, for appellant.

Christian & Christian and *Jesse E. Hodgins*, for appellees.

MCCABE, J.—The errors assigned on this appeal call in question the conclusions of law stated on the special finding of facts by the circuit court, and the action of that court in overruling the plaintiff's motion for a new trial. The substance of the special finding is as follows:

1st. That Robert Stout died intestate on June 18, 1895, leaving surviving him as his only heirs at law the defendant, Jemima Stout, his widow, Lucius Stout, Mary Ann Allen and Andrew P. Stout, his children.

2d. That on the 22d day of October, 1881, Robert Stout, by warranty deed, his wife, Jemima, joining therein, conveyed to the defendant, Mary Rayl, certain described real estate, situate in Hamilton county, Indiana, containing sixty acres. Said deed was duly acknowledged on said day before a justice of the peace; that thereafter, on said day, said deed was handed to the defendant, Jemima Stout, by said Robert Stout, he saying to her, "take it and keep it in a safe place until my death, then deliver it to B. F. Wells;" that said Jemima Stout took said deed and put it in a drawer, which was a safe place, and kept possession of it there under lock and key until the death of said

Stout v. Rayl *et al.*

Robert Stout, whereupon she delivered said deed to said B. F. Wells; that said deed on the day of its execution was put into an envelope by said Robert Stout and sealed up, and there were indorsed on said envelope the words: "Deeds to be delivered by B. F. Wells after my death," and there were indorsed on said deed the words: "After my death this deed to be delivered by B. F. Wells;" that said B. F. Wells, pursuant to the instructions given him by Robert Stout in his life time, called for and received said deed after the death of said Robert Stout, from the defendant, Jemima Stout, and caused the same to be recorded in the deed records of the county; and after said deed had been so recorded he delivered it to the defendant, Mary Rayl, who accepted the same and went into possession of said real estate.

3d. That on February 9, 1884, said Robert Stout, by warranty deed, his wife, Jemima Stout, joining therein, conveyed to the defendant, Mary Rayl, certain other described real estate, situate in the county of Hamilton, and State of Indiana, containing twenty acres, more or less; that said deed was duly acknowledged before a justice; that on said day after said deed had been duly signed and acknowledged, said Robert Stout handed said deed to the said defendant, Jemima Stout, saying to her: "Take it and keep it in a safe place until after my death, then deliver it to B. F. Wells;" that said Jemima Stout took said deed and put it in a drawer, which was a safe place, and kept possession of it there under lock and key until the death of said Robert Stout; that thereupon she delivered said deed to B. F. Wells; that said deed on the day of its execution was put into an envelope and sealed up, and there was endorsed on said envelope this language: "Deeds to be delivered by B. F. Wells after my death;" and there was endorsed on said deed

Barber et al. v. Barber et al.

Axtel v. Chase, 83 Ind. 546; *Hanover, etc., Tp. v. Gant*, 125 Ind. 557.

Appellants cannot in this manner separately assign errors, and the assignment must be held to be joint as to all and not separate as to any of the parties. Such an assignment can no more perform the office of a separate one, than can a demurrer formed in like manner answer for or have the effect of a separate demurrer, and, like a joint demurrer, if not well taken as to all, it will not be available as to any. *Eichbredt v. Angerman*, 80 Ind. 208.

No claim is urged by counsel that the appellant, Swearington, is injuriously affected by the rulings of the trial court, to which error is imputed by the assignment, and in fact the record discloses that he is not so affected, hence it follows that, under the rule stated, the assignment cannot be of avail to either of his co-appellants, and therefore no question is presented upon the merits of the appeal.

Judgment affirmed.

BARBER ET AL. *v.* BARBER ET AL.

[No. 17,811. Filed Oct. 2, 1896. Rehearing denied Dec. 4, 1896.]

APPEAL.—Bill of Exceptions.—Record.—A bill of exceptions containing the evidence signed by the judge and properly entered in the order book in term time as one of the entries in the cause, is a part of the record.

RESULTING TRUST.—Conveyance to a Person Not Paying Consideration.—Statutes Construed.—Under the last clause of section 3398, Burns' R. S. 1894 (2976, R. S. 1881), construed with section 3396, Burns' R. S. 1894 (2974, R. S. 1881), when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust results in favor of the latter, unless it shall be made to appear that by agreement, without any fraudulent intent, the person to whom the conveyance was made was to hold the land in trust for the one paying the purchase-money.

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From the Hamilton Circuit Court. *Reversed.*

Christian & Christian and *T. J. Bishop*, for appellants.

Roberts & Vestal and *Shirts & Kilbourne*, for appellees.

MONKS, C. J.—This is an appeal from an interlocutory order appointing a receiver upon application of appellees, who were the plaintiffs in the court below.

The errors assigned call in question the action of the court in appointing a receiver.

It is urged by appellees that the bill of exceptions, containing the evidence given at the hearing of the application for the appointment of a receiver, is not in the record, and cannot be considered in determining the question presented. The order appointing a receiver was made December 3, 1895, in term time, and on December 6th, in open court, during the same term of court, appellants filed their bill of exceptions, containing the evidence signed by the judge, and a proper term-time order-book entry of such fact was made. This entry, being made in term time, became one of the entries in the cause, and the bill of exceptions was a part of said entry, and was also a paper in the cause, and therefore a part of the record under the provisions of section 641, Burns' R. S. 1894 (629, R. S. 1881).

As the evidence was not taken by a shorthand reporter, there was no longhand manuscript of the evidence, but the clerk has copied said entry and the bill of exceptions containing the evidence as a part of it into the transcript, as required by section 662, Burns' R. S. 1894 (650, R. S. 1881). The certificate of the clerk that "the transcript contains a full, true and complete copy of all the papers and entries in the

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cause," is therefore sufficient, and the evidence is properly in the record.

In *Richwine v. Jones*, 140 Ind. 289, and *Morrison v. Morrison*, 144 Ind. 379, cited by appellees, the transcript contained no order-book, or other entry showing that the bill of exceptions had been filed; those cases are, therefore, not in point here.

Appellees say in their brief that "the complaint is founded upon the last clause of section 3398, Burns' R. S. 1894 (2976, R. S. 1881)." Under this clause, construed in connection with section 3396, Burns' R. S. 1894 (2974, R. S. 1881), when a conveyance for a valuable consideration is made to one person and the consideration therefor paid by another, no use or trust results in favor of the latter, unless it shall be made to appear that by agreement, without any fraudulent intent, the person to whom the conveyance was made was to hold the land in trust for the one paying the purchase-money.

To entitle appellees to the appointment of a receiver upon their theory of the case, it was necessary to prove, not only the agreement on the part of appellant, Elvira Barber, to hold in trust for her husband, John M. Barber, under whom appellees claim title, but also that the conveyance was taken in her name without any fraudulent intent. Section 3398 (2976), *supra*; *Marcilliat v. Marcilliat*, 125 Ind. 472; *Parmlee v. Sloan*, 37 Ind. 469; *Glidewell v. Spaugh*, 26 Ind. 319.

There is no allegation in the verified complaint, which was read in evidence, that the conveyance was taken in the name of appellant, Elvira Barber, without any fraudulent intent; this, however, would not be fatal if such essential fact was established by the other evidence. *Sullivan Electric Light, etc., Co. v. Blue*, 142 Ind. 407. But there was no evidence given upon

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this subject. Appellees, therefore, failed to establish any title upon their own theory of the case.

It follows that the evidence did not entitle appellees to the appointment of a receiver.

Under this view we need not, and do not decide whether a wife can, since the taking effect of section 6960, Burns' R. S. 1894 (5115, R. S. 1881), make a valid agreement with her husband to hold property in trust for him under the provisions of section 3398 (2976).

The interlocutory order appointing a receiver is reversed.

BOWER ET AL. v. BOWER ET AL.

[No. 17,926. Filed December 15, 1896.]

146	393
147	174

TRIAL.—*Venire de Novo*.—*Special Verdict*.—A special verdict is not subject to a motion for a *venire de novo* when it finds facts sufficient to enable the court to pronounce judgment thereon, although the jury fails to find upon all the issues.

148	393
150	161
152	674

SAME.—*Special Verdict*.—*Statute Construed*.—Under section 555, Burns' R. S. 1894 (546 R. S. 1881), providing for a special verdict, as amended by the Act of March 11, 1895 (Acts of 1895, p. 248), when there is a demand for such a verdict upon "all the issues of the cause," a general verdict is not contemplated, but leaves the court to pronounce its judgment upon the special verdict.

SAME.—*Instructions*.—Where the court of its own motion gave instructions numbered 1 to 6, and at the request of plaintiff another set of instructions numbered 1 to 10, an assignment of errors that "the court erred in giving instructions numbered 1 to 6 inclusive," refers to those given on court's own motion.

SAME.—Under section 555, Burns' R. S. 1894, as amended by Act of March 11, 1895, the absence of the usual concluding formula, to-wit: "If, upon the facts found, the law is with the plaintiff, then we find for the plaintiff; if the law is with the defendant, then we find for the defendant," will not vitiate a special verdict.

From the Clark Circuit Court. *Affirmed*.

M. Z. Stannard, H. E. Jewett and C. L. Jewett, for appellants.

J. K. Marsh and W. H. Watson, for appellees.

JORDAN, C. J.—This was an action by the appellees to contest the validity of the will of Andrew Bower,

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executed on September 5, 1887. The testator died in Clark county, Indiana, July 18, 1892, leaving the respective parties to this proceeding as his heirs at law. The grounds of the contest are:

1st. That the testator, at the time of the execution of the will, was of unsound mind.

2d. That it was unduly executed.

3d. That it was procured to be executed through fraud of the defendants.

Upon a special verdict of the jury, the court rendered its judgment in favor of the appellees, adjudging the will to be null and void.

This is the second appeal by the appellants to this court. *Bower v. Bower*, 142 Ind. 194. The principal errors assigned and urged to secure a reversal of the judgment are: 1st. Overruling appellants' motion for a *venire de novo*. 2d. Sustaining appellees' motion for judgment on the verdict of the jury. 3d. Overruling motion for a new trial.

The special verdict was framed under section 546, R. S. 1881 (555, Burns' R. S. 1894), as amended by an act approved March 11, 1895 (Acts 1895, p. 248), and consisted of a number of interrogatories submitted to and answered by the jury. An examination of the verdict discloses that the jury responded to and found upon the issues involved in the action.

Under the rule which now prevails in this jurisdiction, a special verdict is not subject to a motion for a *venire de novo* when it finds facts sufficient to enable the court to pronounce judgment thereon, although the jury fails to find upon all the issues. *Board, etc., v. Pearson*, 120 Ind. 426, 16 Am. St. 325, and cases there cited.

Three hundred and ninety-five interrogatories were answered by the jury, many of these were wholly unnecessary, and could be of no useful purpose, and only

served to perplex and consume the time of the jury. It is insisted by counsel for appellant that, in addition to the answers of the jury to these interrogatories, that there should have been a general verdict, finding in favor of the plaintiffs, in order to authorize the court to render judgment in their favor; and for this reason it is also contended that a *venire de novo* should have been awarded. The special verdict in this case, at the request of appellants, was directed by the court to be returned upon all of the issues in the cause. In answer to appellant's contention, we think that it was the evident purpose of the legislature, by the amendment, to change the practice as it formerly existed, under the section amended, of permitting the court to submit to the jury two special verdicts drafted by the respective parties, in a narrative form, leaving the jurors to accept and return the one which they considered the evidence sustained; and in the future to require that a special verdict shall be framed by means of interrogatories, each of which is to be answered by the jury, under the evidence, and each to be so framed as to require the finding thereon, to embrace but a single fact. The statute, as amended, directs that counsel on either side shall prepare such special verdict, meaning and intending that counsel on each side shall prepare such a number of interrogatories as may be necessary to cover all of the facts material to the issues in the action, all of which interrogatories are to be submitted to the court, subject to its change, modification and final approval. When so approved the court should cause them to be numbered, not in separate sets, but as an entirety, from one to the close, and submit them to the jury, with the instruction that each be answered and all returned as a special verdict in the cause.

When the demand is for such a verdict upon "all of

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the issues of the cause," then it must be so framed as to embrace and cover all facts material to the issues involved, and in this event the statute, as amended, does not contemplate a general verdict, but leaves the court to pronounce its judgment upon the special verdict, as was the former practice. In the event, however, the demand is not for a special finding upon all of the issues, but for a special finding by the jury upon a part only of the material facts, then, in addition to this, the jury must be instructed by the court to return a general verdict, and in such a case, they are only required to answer the interrogatories submitted to them, in the event a general verdict is returned. Under this latter practice, the special finding of facts still controls the general verdict, as provided by section 556, Burns' R. S. 1894 (547, R. S. 1881). In other words, when the request is not for a special finding upon all of the issues, but only upon some particular question of fact germane to the issues, we are of the opinion that the legislature, by the amendment, did not intend to change the law in this respect, but has left it substantially as it was prior to the passage of the amendatory act.

It is further urged that, in case the verdict in dispute can be considered as a special one, that it is nevertheless insufficient, for the further reason that it does not conclude with the usual formula, to-wit: "If, upon the facts found, the law is with the plaintiff, then we find for plaintiff, if the law is with the defendant, then we find for the defendant." While it is the proper practice for a special verdict to contain a formal conclusion substantially as the one insisted upon by counsel, still the absence of such a conclusion will not vitiate a special verdict, which in other respects is sufficient. *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583; *Evansville, etc., R. R. Co. v. Taft*, 2 Ind.

App. 237. The court did not err in overruling the motion for a *venire de novo*.

The next insistence is that certain instructions given by the court on its own motion, and others given at the request of appellees, are erroneous. Two sets of instructions appear in the record. The first consisting of those given by the court on its own motion. These are numbered from one to six. The second set embraces those given at the request of appellees, and are numbered from one to ten. The third assignment of reasons for a new trial, as it appears in the motion, is as follows: "3d. Because the court erred in giving to the jury instructions numbered one to six inclusive, and in each thereof." This is the only assignment in the motion for a new trial based upon the giving of instructions. It is evident, therefore, that the only instructions, the giving of which was assigned as a ground for a new trial, were those numbered from one to six, given by the court on its own motion. The giving of the other ten charges, at the request of appellees, not being assigned as a ground for a new trial, for this reason presents no question for our consideration. We have examined the instructions given by the court upon its own motion, and we are of the opinion that when they are construed as a whole, as they must be, that they are not open to the criticism of appellants. These charges, in effect, advised the jurors as to the nature or character of the special verdict, which they were required to return, and as to the issues involved in the action, and also in regard to the rules for weighing or reconciling conflicting evidence. While some of the expressions or terms employed by the court may possibly be subject to some objections, nevertheless the charges as a whole fairly advised the jury as to its duty relative to the special finding of facts, and in no manner were they harmful to appellants. While we

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cannot consider the objections urged against the instructions given at the request of appellees, for the reason heretofore stated, and while we do not mean to intimate that they were not a correct exposition of the law pertaining to the issues, had the verdict been a general instead of a special one, however, we again repeat, that where there is a special verdict to be returned upon all of the issues, as in the case at bar, there is no use nor propriety in the trial court giving general instructions covering the law of the case.

It is to be regretted that trial judges, where there is a special verdict, so frequently fail to observe this rule. See Elliott's App. Proced., section 645, and the authorities there cited; *Louisville, etc., R. W. Co. v. Lynch* (Ind. Sup.), 44 N. E. 997, and the long list of cases there cited.

Appellants contend that, under the special finding of facts, the court erred in overruling the motion for judgment in their favor. Among other material facts the following are disclosed by the jury's answers to the following interrogatories, which formed part of the special verdict:

"237. Did Andrew Bower, at the time of the alleged execution of the paper writing, which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life and act with discretion therein; and did he know his children and grandchildren, and have a general knowledge of the estate of which he was possessed? Ans. No.

"238. Did Andrew Bower, at the time of the alleged execution of the paper writing, which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life, the value and extent of his property, the number and names of the persons who were the natural objects of his bounty, their deserts with reference to their conduct

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and treatment of him, their capacity and necessity, and did he have sufficient active memory to retain all these facts in his mind long enough to have his will prepared? Ans. No.

“Did Andrew Bower, whose will is the subject of this contest, on the 26th day of August, 1887, have a general knowledge of the estate of which he was possessed? Ans. No.”

We think it is clearly established by the above finding of facts that the testator, at the time he executed the will in dispute, did not possess sufficient mental capacity, under the law, to make a will disposing of his estate. *Todd v. Fenton*, 66 Ind. 25; *Lowder v. Lowder*, 58 Ind. 538; *Durham v. Smith*, 120 Ind. 463; *Burkhart v. Gladish*, 123 Ind. 337; *Harrison v. Bishop*, 131 Ind. 161.

The verdict fully supports the judgment, and there is evidence supporting the former.

No available error appearing in the record, the judgment is affirmed.

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[No. 18,057. Filed December 15, 1896.]

146	399
156	570

HUSBAND AND WIFE.—*Wife's Separate Estate.*—*Widow Remarrying.*—*Right of Alienation.*—*Descent.*—The provision of section 2641, Burns' R. S. 1894 (2484, R. S. 1881), that if a widow shall marry a second or subsequent time, holding real estate by virtue of any previous marriage and there be children alive by such marriage, she cannot alienate such real estate during such second or subsequent marriage, does not preclude her from leasing the real estate for the period of her natural life.

From the Miami Circuit Court. *Reversed.*

Mitchell, Antrim & McClintic and *Nelson & Myers*, for appellant.

Pettit & Stitt, for appellee.

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MCCABE, J.—The appellee brought suit in the Wabash Circuit Court to set aside a written lease by her to appellant of certain lands, situate in Wabash county, and to quiet her alleged title thereto. The venue was changed to the Miami Circuit Court.

That court overruled a demurrer to the complaint for want of sufficient facts, and the defendant refusing to plead further or amend, the plaintiff had judgment.

It appears from the complaint that John McEnderfer died on December 1, 1886, seized in fee-simple of certain lands in Wabash county, particularly described among which was the 123 acres of land now in controversy, leaving surviving him the plaintiff as his widow, and Eldora McEnderfer, who is still living, and a minor, the fruit of said marriage, as his only heirs at law; that said 123 acres was duly set off to said plaintiff in partition proceedings as her undivided interest in the realty of which her said husband died seized; that afterward, on January 1, 1889, the plaintiff intermarried with John H. Davenport, who is still living, and she has ever since been and is now his lawful wife; that thereafter, to-wit: on January 15, 1892, and while still the wife of said Davenport and the owner of said land, she and her said husband executed to the defendant a lease of said land for the consideration of \$1,000.00 for the term of her natural life, reading as follows:

“January 15, 1892.

“This agreement witnesseth, that for and in consideration of the sum of \$1,000.00, this day paid Sarah M. Davenport by Geo. B. Forgy, of Cass county, Indiana, the receipt whereof is hereby acknowledged, Sarah M. Davenport and John H. Davenport, of Wabash county, Indiana, have this day leased to George B. Forgy, of Cass county, Indiana, for the term of the

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natural life of said Sarah M. Davenport, the following lands in Wabash county, Indiana, to-wit: The south 123 acres off of the south end of the east half of section 6, town 29, north of range 6 east, being the same lands mortgaged as described in Record 4, at pp. 30 and 31, of the mortgage records of Wabash county, Indiana.

SARAH M. DAVENPORT.

JNO. H. DAVENPORT."

"Acknowledged January 15, 1892; recorded January 19, 1892, in O 38."

That defendant caused said instrument to be duly recorded in the records of Wabash county aforesaid, on January 19, 1892, in record O, and has ever since claimed, and now claims, that the same is in full force in law; that said lease is void; that defendant is claiming to be entitled to possession under said lease, which casts a cloud upon plaintiff's title and fee-simple ownership. Wherefore plaintiff prays the court that defendant's claim be declared null and void and that plaintiff's title to said real estate be quieted.

The precise question here involved has never yet been decided by this court, though a great many decisions have been made from which the inference may be drawn that a lease of the kind here involved would be void. The most prominent of that kind of cases, and the one most relied on by the appellee to sustain the ruling of the trial court in holding the lease void, is *Vinnedge v. Shaffer*, 35 Ind. 341. That was an attempt to foreclose a mortgage executed by a married woman and her husband on real estate held by her in virtue of a previous marriage. The eighteenth section of the statute of descents then read: "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow

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may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be."

This court said in that case that: "The restraint upon alienation, by the terms of the statute, is as absolute where there are no children of the marriage in virtue of which she received the property, as where there are. The object of the statute seems to be twofold, first to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage, and second, to preserve the property for the children of the marriage in virtue of which she received it, where there are such children, in case of her death during such second or subsequent marriage."

It was held that the mortgage was in some sense an alienation and fairly within the prohibition of the statute, because it might in many cases be an indirect mode of alienation, thereby violating the maxim, that what cannot be done directly cannot be done indirectly.

The court refused to follow the contention of counsel in that case, that the wife might alienate an estate in such real estate, during her life and the fee conditionally, because it would defeat one of the purposes of the statute, namely to protect her against improvident and injudicious alienations thereof during a second or subsequent marriage.

This case was followed by many cases affirming the same doctrine, one of which is *Sebrell v. Hughes*, 72 Ind. 186. That was a case where the widow holding real estate by virtue of the previous marriage had

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married a second time, and with her second husband attempted to convey such real estate. It was there said that: "It is doubtless true, that the deed of Nancy J. Francis and her husband to Hughes conveyed no title. Said Nancy had a good title and estate in fee-simple, but by reason of section 18 of the law of descent, 1 R. S. 1876, p. 411, she was, during coverture of her second marriage, forbidden to convey. This disability, being for her own benefit, as well as that of her own children by her first husband, her deed constituted no estoppel against her, and if she had chosen to reassert her title and reclaim the possession at any time, she could have done so." Citing several cases, among which is *Vinnedge v. Shaffer, supra*. To the same effect as to an attempt to convey by deed are *Knight v. McDonald*, 37 Ind. 463; *Griner v. Butler*, 61 Ind. 362; *Edmonson v. Corn*, 62 Ind. 17; *Avery v. Akins*, 74 Ind. 283; *Insurance Co. v. Athon*, 78 Ind. 10; *Mattox v. Hightshue*, 39 Ind. 95; *Marsh v. Thompson*, 102 Ind. 272.

Other cases of mortgages by the widow and her subsequent husband of real estate held by her in virtue of her previous marriage have followed *Vinnedge v. Shaffer, supra*, holding such mortgages void, namely: *Bowers, Admr., v. Van Winkle*, 41 Ind. 432; *McCullough v. Davis*, 108 Ind. 292; *Aetna, etc., Ins. Co. v. Buck*, 108 Ind. 174.

It has also been held that such real estate so held by such widow who has married a second or subsequent time cannot be sold on execution against her during such subsequent marriage, by reason of the restraint upon alienation, imposed by said section of the statute, in *Schlemmer v. Rossler*, 59 Ind. 326; *Miller v. Noble*, 86 Ind. 527, and *Smith v. Beard*, 73 Ind. 159.

All these cases, it is argued, inferentially hold that such widow, during such subsequent marriage, cannot

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alienate a life estate in such lands by a lease or otherwise. Because it is claimed that the mortgages, voluntary deeds and sheriff's sales involved in those cases might have been upheld to the extent of conveying a life estate if the statute does not restrain the alienation of a life estate. But none of the cases referred to assign any reason for the holding but the first two, and they assign the reason that one of the objects of the restraint upon alienation was to protect the woman from improvident and injudicious alienations during a second or subsequent marriage.

As to the power of a court to declare a deed purporting to convey a fee-simple title, by one holding the title in fee-simple, to be only a conveyance of a life estate, is neither mentioned nor discussed; nor is a word said as to whether a sale of a life estate only, on execution of land, against one holding the title in fee-simple, can be made, or whether a mortgage purporting to mortgage the fee, by one holding the fee, can be converted into a mortgage of a life estate so as to avoid the effect of the prohibition against alienating the fee, is not alluded to in any of those cases. A deed or mortgage purporting to convey or mortgage the fee, by one holding only a life estate, might be sufficient to convey or mortgage the life estate, that being all the interest the mortgagor or grantor had in the real estate. But whether his mortgage, deed or sale against him on execution purporting to mortgage, convey or sell the fee, he being the owner of the title in fee-simple, can be converted into a mortgage, conveyance or sheriff's sale of a life estate only so as to avoid a statutory prohibition against alienations, presents a different question.

Such was the nature of all the mortgages, deeds and sheriff's sales involved in the cases above referred to. The land here involved descended to the appellee from

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her former husband, and the title in fee-simple vested in her by virtue of the section of the statute of descents preceding the one already referred to, being the old seventeenth section. Burns' R. S. 1894, section 2640 (R. S. 1881, 2483); *Schlemmer v. Rossler, supra*; *Philpot v. Webb*, 20 Ind. 509; *Jackson v. Finch*, 27 Ind. 316. And her second or subsequent marriage did not divest her title. *Small v. Roberts*, 51 Ind. 281; *Philpot v. Webb, supra*.

In the case of *Jackson v. Finch, supra*, it was sought to recover back money paid on an executory contract made by a widow and her subsequent husband for the conveyance of land held by her in virtue of her previous marriage. The defendants tendered to the plaintiff a quit-claim deed, which he refused to accept. It was there said: "It is contended that a less estate may be alienated by her, and that the quit-claim deed passed that estate. According to appellee's own evidence, she contracted to sell her interest in the land of her late husband. This she could not do. Her offer to convey a less interest than she contracted to convey, was not a compliance with her contract."

The cases above referred to as holding that a widow, during a subsequent marriage, cannot mortgage or convey land held by her in virtue of a previous marriage, and that such land cannot be sold on execution against her during such subsequent marriage, are not necessarily inconsistent with the power to lease the same by her for life, unless it be those of said cases which hold, that the restraint on, or suspension of, her power of alienation is to protect her against improvident and injudicious alienations during the subsequent marriage, as well as to preserve the property for the children in case of her death during the subsequent marriage.

The section of the statute has been materially modi-

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fied by amendment since all of those decisions were made except one, namely, *The Aetna, etc., Ins. Co. v. Buck, supra*. But that case does not proceed upon the ground that the restraint on, or suspension of, the power of alienation was for the benefit of the woman. It was simply an attempt to mortgage the fee during the subsequent marriage by a widow of lands held by her in virtue of her previous marriage. As before observed, the decision in that case is not necessarily inconsistent with the power to lease such land during her life, even though the section of the statute imposing the restraint had been so changed before that decision as to take away one of the objects of the original section, namely, the protection of the woman against improvident and injudicious alienations.

In 1879 the section was so amended as to read as follows: "If a widow shall marry a second or subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children, or their descendants alive by such marriage, such widow may not, during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate; and if during such marriage such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be: *Provided, however,* That such widow and her living husband may alienate such real estate, if her children by the marriage in virtue of which such real estate came to her shall be of the age of twenty-one years and join in such conveyance: *And provided, further,* That in case there be no child or children or their descendants, by the marriage in virtue of which such real estate came to such widow, then, in such case, such widow may, during such second or subsequent marriage, by her second or subsequent

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husband joining in the conveyance thereof, alienate such real estate in fee-simple."

It is, we think, very clear if the original section had for one of its objects the protection of women against improvident and injudicious alienations during her subsequent marriage, that object has been entirely taken away by the amendment; and that the amendment leaves but one object to be accomplished by the suspension of, or restraint on alienation during the second or subsequent marriage, and that is, to preserve the fee-simple for the children of the marriage in virtue of which she received it, in case she dies during such second or subsequent marriage; *Marsh v. Thompson, supra*. Because the restraint on, or suspension of the power of alienation ceases if the second or subsequent marriage ceases for any cause during her life; *Piper v. May*, 51 Ind. 283. And if she had children by the second or subsequent marriage and dies unmarried, leaving children by both marriages, the land received in virtue of the first marriage will descend to all her children alike; *Teter v. Clayton*, 71 Ind. 237.

The single object of the section, as above indicated, can be fully accomplished by restraining or suspending the power of alienation of the fee during the second or subsequent marriage. To accomplish that object it is wholly unnecessary to interfere with the power to lease for a term of years or for the life of the owner.

But let us see what it is that the statute prohibits the alienation of during the second or subsequent marriage. It is real estate held by such widow in virtue of any previous marriage. How does she hold it? The section in question does not provide. But the preceding section, being the old seventeenth section, provides that: "If a husband die testate or intestate,

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leaving a widow, one-third of his real estate shall descend to her in fee-simple." 2640 (2483), *supra*. The estate, therefore, which such widow holds in virtue of her previous marriage, as referred to in the amended eighteenth section, quoted above, is an estate in fee-simple. And that is the estate which the section has reference to in the provision that "such widow may not, during such second or subsequent marriage, with or without the assent of the husband, alienate such real estate," and in the last proviso, providing in case there be no child or children or their descendants of the marriage, in virtue of which such real estate came to her, that such widow may, during such subsequent marriage, by such husband joining in the conveyance thereof, "alienate such real estate in fee-simple." This view is strongly supported by some of the earlier cases in this court, construing the section even before its amendment.

In *Blackleach et ux. v. Harvey*, 14 Ind. 564, it was said, at pp. 565-6, that: "It has already been intimated in a former opinion, that the object of that section, and others, of the law of descents, was to preserve and transmit the estate to the children of the prior marriage. *Ogle v. Stoops*, 11 Ind. 380, and cases cited. It could not be to protect the widow, or wife, from encroachment on the part of her husband; for the law allows first wives to convey their property with the consent of their husbands, *Reese v. Cochran*, 10 Ind. 195; and, beyond doubt, first wives need as much protection from the influence of their husbands as do second.

"This being so, it would seem that section 18 above quoted, should only be applied in restraint of the right of the wife to convey, in fee-simple, her real estate, while she had children living by a former husband who might inherit it. * * * * The statute

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of *Gloucester* prohibited the alienation, by the widow, of the estate assigned to her as dower; but it was held that an alienation for life simply, being no more than her interest, as it worked no wrong to her heirs, was not within the statute. See Book 2, Blacks. Comm., Shars. Ed., p. 137, and note 26."

And in *Jackson v. Finch*, 27 Ind. 316, in speaking of the two statutes of descents mentioned, it was said: "But in the statute under consideration, there was a new estate created for the first time in the widow—that of an estate in fee in a specified portion of the lands of the husband. The eighteenth section is a provision in relation to the manner in which this new estate was to be held, so far as her power of alienation was concerned. There was no existing evil to be remedied. There is nothing to guide us as to the intention of the legislature but the plain and obvious meaning of the words of the statute. Indeed, the language is so plain that it does not admit of interpretation: 'such widow may not, during such marriage with or without the assent of her husband, alienate such real estate.' Her estate is a fee. That estate, by the express words of the statute, cannot be alienated during her second or subsequent marriage."

But that she might dispose of an estate less than the fee-simple, provided such disposition does not interfere with or defeat the object of the statute, in preserving the estate in fee for the children of the previous marriage, in case of her death during such second or subsequent marriage, if not contemplated by the section quoted, seems unavoidably required by a subsequent statute. That statute was enacted in 1881, and section 2 thereof reads thus: "A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, to-

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gether with all the rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: *Provided, however,* That she shall be bound by an estoppel *in pais* like any other person." Burns' R. S. 1894, section 6962 (R. S. 1881, 5117).

We have seen that she is the owner of the land in fee-simple, with the power of alienation thereof suspended during the second or subsequent marriage. That is the only qualification to her absolute ownership, and that only subsists during the subsequent marriage. The statute last quoted therefore makes all the rents, issues, income and profits thereof her separate property, and places the same under her control, the same as if she were unmarried. She cannot have and control the rents, unless she can rent the land. Indeed, she cannot derive any benefit from her farm unless she can rent or lease it for a given time. We judicially know that she cannot rent a farm for a less term than one year, because it takes that length of time practically for the lessee to derive any benefit from such lease or renting. Therefore, all must concede that she is at least impliedly authorized to rent or lease it at least one year. And if one year, then the same principle would authorize her to rent for a term of years. If, however, she should die during the marriage and before the expiration of the term, leaving a

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child or children or descendants by the marriage in virtue of which the real estate came to her, the lease would expire by operation of law before the expiration of the term by the land descending to her children. Thus it seems that such leases, whether for a long or a short term, would be valid, during her life at least.

Then, if a lease, which by its own provisions is to be for the term of her life, is not valid, why should a lease for a year or a term of years be valid for that portion of the term during which she lives? For that may be a lease beyond her life.

All must admit that, under the statute quoted, a lease for a year or a term of years is valid, at least for so much of the term as she lives. And if that is so, a lease which by its own terms is limited to the term of her natural life is less objectionable and less liable to conflict with the statute than a lease for a year or a term of years. Indeed, a lease for her life cannot come in conflict with the statute or defeat its object, to preserve the estate for the children, while a lease for a year or a term of years might, if enforced according to its terms. We therefore conclude that the lease in this case was valid, and that the court below erred in overruling the demurrer to the complaint seeking to avoid it.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

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[No. 17,847. Filed December 16, 1896.]

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PROMISSORY NOTE.—*Payment.*—Defendant executed, as surety, a promissory note payable to a certain bank pursuant to an agreement, that in the event defendant assigned to the bank a certain

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judgment owned by him he should be relieved of all liability on the note. On the death of the maker of the note it was filed and proven as a claim against his estate and defendant in accordance with his agreement assigned the judgment held by him to the bank. A receiver thereafter appointed for the bank sold all accounts, notes and choses in action of the bank. *Held*, that the note had wholly ceased to be an asset of the bank before the appointment of a receiver.

AGENCY.—*President of Bank as Agent*.—Where the president of a bank is held out to the public as fully empowered to attend to all the business of the bank, an adjustment by him of a claim in favor of the bank, by taking the assignment of a judgment, is valid.

EVIDENCE.—*Executed Parol Agreement*.—*Contemporaneous Written Obligation*.—An executed parol agreement may be proven even as against a written obligation contemporaneous with the parol agreement.

From the Marion Superior Court. *Affirmed*.

Lamb & Hill, for appellant.

Duncan, Smith & Hornbrook, for appellee.

HOWARD, J.—This was an action by the appellant against the appellee, on a promissory note, executed by the appellee and one John Hanna, on the 29th day of September, 1880, to the First National Bank of Indianapolis, No. 55.

There was an answer in four paragraphs: (1) Admitting the execution of the note, but averring that, in consideration of the assignment to the bank of a certain judgment, the appellee was released of all liability on the note; (2) a plea of payment; (3) a general denial; and (4) averring that at the time of the execution of the note it was agreed between the bank and appellee that whenever appellee should assign the said judgment to the bank such assignment was to be accepted in full satisfaction of appellee's liability on the note; and that, in pursuance of said agreement appellee did assign the judgment to the bank, and the same was accepted in full discharge of appellee's said liability.

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The cause was tried by the court, and a special finding of facts made, with conclusions of law in favor of appellee.

Error is assigned on the conclusions of law, and also on the overruling of the motion for a new trial.

The facts as found by the court, with the conclusions of law thereon, are as follows:

"1st. On the 29th day of September, 1880, the defendant, with one John Hanna as surety for him, executed to the First National Bank of Indianapolis, No. 55, the note in suit, in the form set out in the complaint; that William H. Morrison, president of the bank, transacted the business on behalf of the bank.

"2d. That contemporaneous with the execution of the note, it was agreed by and between William H. Morrison, president of the bank, and said John Hanna and the defendant, that if thereafter said John C. New should, upon the request of the bank, assign to said bank a certain judgment theretofore recovered by the Indiana National Bank against said John Hanna, Frederick Knefler, George W. Parker and Aquilla Parker, on the 12th day of September, 1870, for \$2,782.47, in cause No. 14,297, in the Superior Court of Marion county, in the State of Indiana, and which had theretofore been assigned by said Indiana National Bank to said John C. New, such assignment would be accepted by the First National Bank of Indianapolis, Indiana, in full payment and discharge of said John C. New's liability on said note.

"3d. That since the first of March, 1878, said William H. Morrison had been president of said bank, and had by the directors thereof been intrusted as chief executive officer of said bank, with the control and management of its affairs; that he spent his whole time during business hours at the bank, conducting its business; that he in all things directed the policy

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of the bank; discounted paper at his discretion without consulting the directors or any other officer of the bank, and had the general management and control of its affairs with the consent of its directors; that the directors met at irregular intervals, sometimes months intervening between such meetings.

"4th. That after the maturity of said note, said Morrison continued as president until in the month of March, 1881, when he died; that immediately after his death Augustus D. Lynch was elected president of said bank, and continued as such until the 25th day of August, 1883, when he resigned, and A. B. Conduitt was elected as his successor.

"5th. That on the 31st day of August, 1881, the First National Bank of Indianapolis, Indiana, payee in said note, went into voluntary liquidation, its charter having expired, and on the 1st day of September, 1881, the First National Bank of Indianapolis, No. 2556, the plaintiff in this action, began business.

"6th. That said John Hanna died in the month of September, 1882, and some time after his death, but prior to June 14, 1884, said note, with others, was delivered by the payee therein, bank No. 55, to its attorneys, to be filed as a claim against the estate of said John Hanna, but without any instructions to proceed against John C. New; that said notes were filed as a claim against the estate of said John Hanna and allowed prior to June 14, 1884.

"6½. That on the 24th day of December, 1883, the defendant, John C. New, at the request of the president of the First National Bank of Indianapolis, No. 55, assigned said judgment against Hanna, Knefler, George W. Parker and Aquilla Parker, to said bank No. 55, which assignment to said bank No. 55 was made by said New in fulfillment of his agreement with said William H. Morrison, president of said bank,

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made at the time of the execution of said note; and said assignment was by said bank received in fulfillment of such agreement.

“7th. That afterwards, on the 14th day of June, 1884, Harry J. Milligan was by the United States court in and for the District of Indiana, in a certain cause pending in said court, appointed receiver of the First National Bank of Indianapolis, Indiana, No. 55, the original payee of said note.

“8th. That upon the appointment of said Milligan as such receiver, he received the assets of said bank No. 55 from the officers thereof. And that in transferring such assets to said receiver, the officers described the claim against the estate of John Hanna as one of the assets of said bank No. 55, but no mention was made of any liability of said John C. New on said note. Nor was said note ever delivered to said Milligan as such receiver; nor did he ever at any time understand that he had as an asset of said bank any note upon which John C. New was liable as maker or in any other capacity.

“9th. That on the 31st day of October, 1885, said Milligan, as such receiver, acting under a proper order of the United States Circuit Court directing him to sell all the assets of said bank then undisposed of, made a sale of all such undisposed of assets. But at the time of his making such sale he did not have said note in his possession, did not know of its existence, did not understand he was selling any such note. In a schedule of assets for sale which he had caused to be printed, no mention was made of any such note. But therein there was disclosed and shown the claim against the estate of John Hanna.

“Upon such sale the plaintiff in this action, the First National Bank of Indianapolis, became the purchaser at a gross bid of all the assets of said bank No. 55,

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then sold by said receiver under said order; and upon such sale executed to the plaintiff a certificate of such sale, reciting that he had been ordered to sell at public auction 'all claims, notes, judgments, choses in action * * and all other property of said bank or said receivership,' and declaring that he had sold 'all property of every description belonging to said bank No. 55 and of the receivership,' whether specifically described or not (saving and excepting certain claims not material to this issue) and confirming to said purchaser the sale of 'all the claims, notes, accounts, judgments, choses in action * * and all other property of said bank or said receivership' (saving and excepting some claims not material to this issue).

"That said assignee did not indorse to the purchaser the note in suit, although he did indorse to the purchaser all notes which he had in his possession, and he did formally assign to the purchaser the claim against the estate of John Hanna, and also the judgment hereinbefore referred to against Hanna, Knefler, George W. Parker and Aquilla Parker.

"10th. From the conduct of Mr. Morrison after the maturity of the note in suit, until his death, and of Mr. Lynch during his presidency, and Mr. Conduitt during his presidency, and of the other officers of the bank, the court infers as a fact, and therefore finds as a fact, that such officers at the time knew of the agreement made between the defendant, William H. Morrison, on behalf of the bank, and the fact has escaped their recollection."

On the foregoing facts the court stated the following conclusions of law:

"1st. The title to said note never passed to and became vested in the plaintiff.

"2d. That in any event, whether the title to said note became vested in the plaintiff or not, upon the as-

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signment of said judgment by the defendant to the First National Bank of Indianapolis, No. 55, the defendant was discharged from all liability on said note.

"3d. That the law of the case is with the defendant, and he is entitled to judgment.

PLINY W. BARTHOLOMEW, Judge."

It is claimed that the first conclusion of law must be erroneous, since the facts found, particularly those in the ninth finding, show that the title to the note passed, through the receiver, from the payee, bank No. 55, to the appellant bank No. 2556. Even if that were true it would, perhaps, be immaterial, in view of the remaining conclusions of law. But we do not think the contention tenable. Undoubtedly if the note remained an asset of bank 55 such asset would become the property of bank 2556. It appears, however, by findings 2 and 6½, that all liability of John C. New on the note ceased on the assignment by him to the bank of the judgment mentioned in those findings; and, by finding 6, it further appears that the note was filed and allowed, with other notes, as a claim against the estate of John Hanna, the other signer of the note, thus merging the note in such claim, so far as the liability of Hanna or his estate is concerned. The note therefore, according to the findings, had wholly ceased to be an asset of bank 55 before the appointment of the receiver.

By finding 9, it is further shown that the claim allowed against the Hanna estate in favor of bank 55, and also the said judgment assigned by appellee to said bank, both became, by assignment of the receiver, the property of the appellant bank No. 2556.

Appellant's principal argument is directed to the contention that the court erred in overruling the motion for a new trial, for the reason, as claimed, that

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the findings are not supported by the evidence. If there was competent and sufficient evidence to sustain the findings, we could not disturb them, however much contradictory evidence might have been given.

To enable appellee to succeed in his defense, it was necessary for him to prove, (1) the parol agreement averred to have been made between him and the bank when he executed the note, according to the terms of which agreement he was to be relieved of all liability on the note as soon as he should assign to the bank the judgment referred to; and, (2) that the agreement so made was carried out by the assignment of the judgment and its acceptance by the bank in discharge of his obligation on the note.

The evidence of the appellee is to the effect that the agreement made at the signing of the note was with William H. Morrison, then president of the bank. It is contended very earnestly that Mr. Morrison, as president, had no power to make such an agreement on the part of the bank, inasmuch as the making of such an agreement was out of the ordinary course of the business of the bank, and, consequently, beyond the scope of his agency as president. Many extracts are made from the by-laws to show that the power claimed to have been exercised by him in making the contract was not given to the president. Numerous authorities also are cited to show that the president of a bank cannot have such power unless the same is so expressly given.

It is true that, except as otherwise specifically provided in the charter, the business of a bank is in charge of its board of directors, and, without their authority to do so, the president cannot bind the bank in any unusual manner, or in any undertaking lying outside of its customary routine business. 1 Morse Banks and Banking, section 144. But, as said by the

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same text writer, such unusual authority to the president may be given, not only by a formal vote of the board of directors, but also "by the existence of such facts as constitute a public holding out, and warrant the public in believing that the undertaking is within the scope of his legitimate delegated authority." *Ib.* See, also, *National, etc., Bank v. Vigo, etc., Bank*, 141 Ind. 352; *Evansville, etc., Co. v. Bank of Commerce*, 144 Ind. 34, 3 Am. and Eng. Corp. Cas. (N. S.) 249.

In this case, as the evidence shows, and as also expressly stated in the third finding of the court, Mr. Morrison was held out to the public as fully empowered to attend to all the business of the bank. Those dealing with the bank were therefore warranted in believing that he was authorized to attend to such general business with the public as might be transacted by the directors themselves. That would of course include such an adjustment of a claim in favor of the bank as was contemplated in this case, provided only the agreement was afterwards carried into effect. An executed parol agreement may be proved even as against a written obligation contemporaneous with the parol agreement. *Tucker v. Tucker*, 113 Ind. 272; *Zimmerman v. Adce*, 126 Ind. 15.

The proof that the agreement was so carried into effect by the assignment to the bank of the judgment against Hanna and others by appellee, was made by evidence satisfactory to the court, and which we think sufficient for the purpose. That the evidence is not such as to be altogether free from criticism, or that there was other competent evidence opposed to it, can not be a reason for reversing the judgment. The transactions had taken place many years before the trial. The judgment assigned to the bank by appellee had been taken against Hanna and others fifteen years before the trial, and the note in suit had been ex-

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ecuted eleven years before that time. Mr. Morrison the president of the bank, had been dead for ten years, and Mr. Hanna, the judgment defendant, for nine years. Only Mr. New was living of those who had any personal recollections of the original transactions, and his memory was sometimes at fault. Neither is the evidence as to the circumstances attending the assignment of the judgment made on December 24, 1883, eight years before the trial, quite satisfactory. The court, however, held it sufficient, and we cannot say that it is not.

Some circumstances lend strong presumptions in favor of the finding of the court. While Mr. Morrison was yet living and remained president of the bank, knowing all about the transactions, and after the note was past due, Mr. New often had more money on deposit than would have paid the note, yet no call was ever made on him for payment. At Mr. Hanna's death attention was called to the note, and it was filed as a claim against his estate; yet no one asked Mr. New to pay the note, though both he and Mr. Hanna had signed it. In 1882, when a Mr. Shipp was elected director, he made diligent effort to learn the condition of the bank, yet he never heard of any indebtedness of Mr. New. In 1884, when the receiver was appointed, he never learned of any claim held by the bank against Mr. New; and while the receiver did assign to the appellee the claim against the Hanna estate, of which the note was in part the foundation, and also the Hanna judgment, he never saw or assigned the note in question. The circumstance, too, that nothing was ever paid on the note, either principal or interest, although at the commencement of the trial it was past due for nearly eleven years, a time longer than the period now provided by statute as a limitation to the bringing of an action on a promissory note, is also to

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be taken into account in support of the claim that it was never expected that the note should be paid by the appellee otherwise than by the assignment of the Hanna judgment.

The judgment is affirmed.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO. v. THE TOWN OF CROWN POINT.

[No. 17,904. Filed December 16, 1896.]

MUNICIPAL CORPORATIONS.—Powers Limited to Those Granted by the Legislature.—Municipal corporations possess such powers only as are granted by the legislature in express words and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.

SAME.—Statutes Granting Powers to a Municipality Strictly Construed.—Any doubt or ambiguity in the terms used by the legislature in granting powers to a municipal corporation is resolved against the corporation.

SAME.—Ordinances.—When Constitutional.—An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution; while an ordinance which the municipality seeks to uphold by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial.

SAME.—Town Ordinance Requiring Railroad to Maintain Crossing Gates.—Statutes Construed.—Sections 4404 and 4357, Burns' R. S. 1894 (3333 and 3367, R. S. 1881), do not authorize an ordinance to compel a railroad company to keep, at its own expense, a watchman and erect and maintain a gate on each side of the track at each street crossing within the corporate limits of a town.

From the Lake Circuit Court. *Reversed.*

N. O. Ross and J. B. Peterson, for appellant.

W. C. McMahan, for appellee.

MONKS, J.—The question involved in this appeal is as to the power of incorporated towns to compel, by ordinance, a railroad company to keep a watchman

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and erect and maintain gates at points where the tracks cross a street, and impose penalties for the failure so to do.

It is the law in this jurisdiction that municipal corporations possess and can exercise such powers only as are granted by the legislature in express words and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.

No incidental powers can be implied except such as are essential to the accomplishment of the purposes of their creation and for their continued existence. *City of Shelbyville v. Cleveland, etc., R. W. Co., ante, 66*, and authorities cited; *Champer v. City of Greencastle*, 138 Ind. 339, and cases cited; 1 Dillon Munic. Corp., sections 89, 90.

Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. *Minturn v. Larue*, 23 Howard (U. S.) 435; *Bloom v. Xenia*, 32 Ohio St. 461; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445; Cooley's Const. Lim. 233, 234; 1 Dillon Munic. Corp., sections 89, 90, 91; Tiedeman on Munic. Corp., section 110.

It is also settled law that where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the powers granted, prescribing penalties within the designated limit, cannot be set aside by the courts because they may deem it unreasonable or against public policy. But where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such

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legislation are not prescribed, then the ordinance passed pursuant thereto must be a reasonable exercise of the power or it will be pronounced invalid. In other words, an ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution, while an ordinance which the municipality seeks to uphold by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial, and not arbitrary or oppressive. *City of Shelbyville v. Cleveland, etc., R. W. Co., supra*, and authorities cited; *Haynes v. City of Cape May*, 50 N. J. L. 55, 13 Atl. 231; *Hawes v. City of Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Ex parte Chin Yan*, 60 Cal. 78; *Davis v. Town of Anita*, 73 Ia. 324, 325, 35 N. W. 244; *Burg v. Chicago, etc., R. W. Co.*, 90 Ia. 106, 48 Am. St. 419, 57 N. W. 680; *Myers v. Chicago, etc., R. R. Co.*, 57 Ia. 555, 42 Am. Rep. 50, 10 N. W. 896; *Phillips v. City of Denver*, 19 Col. 179, 41 Am. St. 230, 34 Pac. 902; *City of St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278; *Evison v. Chicago, etc., R. W. Co.*, 45 Minn. 370, 48 N. W. 6; 1 Dillon Munic. Corp. 319, 330; Tiedeman Munic. Corp., section 110; *Robinson v. Mayor, etc.*, 34 Am. Dec., note pp. 627, 643.

It is contended by appellee that section 4404 and clauses 4, 6, 9 and 16 of section 4357, Burns' R. S. 1894 (3367 and 3333, R. S. 1881), did grant the power in question. By section 4404, *supra*, the board of trustees of an incorporated town is given the "exclusive power over the streets, alleys, highways and bridges within the corporate limits of such town." Said clauses of section 4357, *supra*, are as follows:

"Fourth. To declare what shall constitute a

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nuisance, and to prevent, abate and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary.

"Sixth. * * * * to regulate or prohibit the use of firearms, fireworks or other things tending to endanger persons or property; to prevent interference with the free use of the streets and alleys of the town, and to preserve peace and good order and prevent vice and immorality.

"Ninth. To lay out, open, grade and otherwise improve the streets, alleys, sewers, sidewalks and crossings, and keep them in repair and vacate the same.

"Sixteenth. To make and establish such by-laws, ordinances and regulations not repugnant to the law of this state, as may be necessary to carry into effect the provisions of this act. * * *"

The question before us and which we are called upon to decide, is not whether the legislature, in the exercise of its broad police power, should compel railroads to keep watchmen and erect and maintain gates at their own expense at street crossings, nor is it whether the legislature should grant such power to incorporated towns, but it is whether the legislature has granted such power to incorporated towns.

It is clear said sections 4357 (3333) and 4404 (3367), *supra*, do not in express words grant the power to pass the ordinance in question.

Can such power be fairly implied from those expressly granted, or is such power essential to the declared objects or purpose of the corporation? We think not.

It may be admitted that incorporated towns have the power to regulate public travel upon the streets so as to make their use reasonably safe at all times for those who go upon them, and to enact ordinances for the protection of health, life and property.

It is true, that the persons and property of those who attempt to cross a railroad track are subject to risk. The question, however, is not whether the incorporated town has a right to protect its inhabitants or their property, but whether it has the right to compel the railroad company to do so at its own expense. The propositions are essentially different. It is not enough to show that incorporated towns have been given the power to regulate travel upon the streets and to protect life and property. It may be that under the provisions of the statute above set forth, incorporated towns have the power to keep watchmen and erect and maintain gates at points where a railroad crosses the streets of the town, but this, if true, would not uphold the ordinance in question. Under such a power, if it exists, the watchman must be employed and the gates erected and maintained at the expense of the town. To sustain the ordinance it must be shown that they have been empowered to compel railroad companies, at their own expense, to employ a watchman and erect and maintain gates at each street crossing, the agency here invoked to accomplish the object. If the employment of the watchman and erection and maintenance of the gates by the incorporated town would as well accomplish the object, it cannot be said that the power to compel the railroad company to do so is implied from the authority to regulate public travel upon the streets and protect life and property.

A railroad company in crossing the streets is on an equality with the citizen, their rights are mutual. The streets are for public use, and the company has the right to propel its locomotive and cars across them, and is not a wrongdoer in so doing. It is liable in damages to anyone who, without fault on his part, is injured by the negligence of the railroad company at

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such crossings. It is clear, therefore, that a railroad company is not guilty of any crime or wrongful act in running cars on its tracks across a street, neither would such an ordinance prevent interference with the free use of the streets and alleys of the town. On the contrary, the use of the streets would not be as free, perhaps, with gates and watchmen as without them.

The provision of clause six, granting the power "to regulate or prohibit the use of firearms or other things tending to endanger persons or property" gives no aid to appellee's contention. If it were admitted that this provision applied to railroads, it would only authorize an ordinance as to the manner in which railroads should manage their trains and property within the limits of the corporation:

There is a wide difference between the power to compel the employment of watchmen and the erection and maintenance of gates, and the power to regulate the speed of cars within the corporate limits of a town. The objects in the latter case is to be attained by the management and use by the company of its machinery, and such regulation relates to how the company shall manage its own property within the corporate limits, while the requirement of gates and watchmen relates to how the company shall compel or induce others upon the streets to regulate themselves and their property when approaching and about to cross its tracks.

Sections 4357 (3333) and 4404 (3367), *supra*, may authorize an ordinance, not unreasonable in its terms, to prevent the standing of cars and other obstructions on railroad tracks at street crossings, so as to obstruct the same, or an ordinance regulating the speed of railroad trains within the corporate limits of a town, but most certainly not an ordinance to compel the rail-

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road company to keep, at its own expense, a watchman and erect and maintain a gate on each side of the track at each street crossing. Incorporated cities exercise this power, not by virtue of the control given them by the legislature over the streets and alleys, nor their power to lay out, open and improve streets and alleys, but under clause 42, section 3541, Burns' R. S. 1894 (3106, R. S. 1881). *Kistner v. City of Indianapolis*, 100 Ind. 210.

It follows that the court erred in overruling the demurrer to the complaint.

Judgment reversed, with instructions to sustain the demurrer to the complaint and for further proceedings not in conflict with this opinion.

THE STATE v. DUGGINS.

[No. 17,606. Filed December 17, 1896.]

CRIMINAL LAW.—Affidavit and Information.—Not Necessary to File in Open Court.—It is not necessary that an affidavit and information be filed in open court, a filing in term time in clerk's office is sufficient.

SAME.—Affidavit and Information.—Order-Book Entry of Filing.—An order-book entry of the filing of an affidavit is unnecessary. The mere statement of the clerk that the same was filed as shown by his file-mark is *prima facie* sufficient to give jurisdiction.

SAME.—Affidavit and Information.—An information need not state that it was filed when the court was in session, and that the grand jury had been discharged for the term.

SAME.—Rape.—Sufficiency of Affidavit and Information.—An affidavit and information charging that defendant "did then and there unlawfully, feloniously and in a rude, insolent and angry manner touch, strike, pull, push, grasp and wound one A., a woman then and there being, with intent then and there and thereby unlawfully, feloniously, forcibly and against her will to ravish and carnally know her," etc., contains the essential elements of an assault and battery with intent to commit a rape.

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From the Floyd Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *W. C. Utz*, *M. W. Funk* and *Merrill Moores*, for State.

Kelso & Kelso, for appellee.

HACKNEY, J.—It appears from the record “that on the 20th day of December, 1894, the same being the seventieth judicial day of the October term, 1894, of the Floyd Circuit Court,” an “affidavit and information were filed in the clerk’s office of” said court. Each said affidavit and information charged that the appellee, “on the 6th day of November, 1894, at said county of Floyd, and State of Indiana, did then and there unlawfully, feloniously and in a rude, insolent and angry manner touch, strike, pull, push, grasp and wound one Annie Schaum, a woman then and there being, with intent then and there and thereby unlawfully, feloniously, forcibly and against her will to ravish and carnally know her, the said Annie Schaum,” contrary, etc.

The file mark upon each, said affidavit and information, copied into the record, discloses a filing thereof on said 20th day of December, 1894.

The appellee was arrested upon a warrant issued on said last named day, and on the following day gave bond for his appearance on the first day of the next term of said court. At the next term of said court, the appellee appeared in person and by counsel, and moved to quash said information, which motion was sustained, an exception was reserved, and that ruling is the only assigned error in this court.

We have not been favored with a brief on behalf of the appellee, and are not advised as to the reasons supporting the action of the trial court, further than as counsel for the appellant have stated that in the

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argument, in the lower court in support of the motion, it was insisted (1) that the affidavit and information were filed in the clerk's office instead of having been filed in open court; (2) that allegations should have been made that the court was in session and that the grand jury had been discharged for the term; and (3) that there had been no order-book entry of the filing of such affidavit and information.

The first and third of these objections, to the filing of an affidavit and information, have been held untenable. *Masterson v. State*, 144 Ind. 240; *State v. Matthews*, 129 Ind. 281.

It was held in the first of these cases that the court would know judicially that the day of the filing was in term time, and that it was sufficient if the filing was in the clerk's office. In the last case cited it was held that if it appeared from the file mark it was *prima facie* sufficient to give jurisdiction.

The second objection stated has been held also to be of no avail. *Wright v. State*, 144 Ind. 210; *Nichols v. State*, 127 Ind. 406; *State v. Drake*, 125 Ind. 367; Burns' R. S. 1894, section 1802 (1733 R. S. 1881).

Ordinarily, the motion to quash has the effect of a demurrer, and admits the right to prosecute and the facts pleaded, but denies their sufficiency to constitute a cause of action. It may, therefore, be doubted whether the objections here made were raised by the motion to quash.

We observe no defect in the charge, and accept the statement of counsel for the appellant as to the objections urged below, since the court's ruling must have been for some such reasons or it would not have been deemed insufficient as charging an assault and battery. We are impressed that the information contains the essential elements of an assault and battery with the intent to commit an act which, if accomplished,

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would have been rape. It is, therefore, the opinion of this court that the ruling of the trial court was erroneous.

The judgment is reversed, with instructions to the circuit court to overrule the appellee's motion to quash the information.

CONNER v. THE CITIZENS' STREET RAILROAD COMPANY
OF INDIANAPOLIS.

[No. 17,796. Filed December 17, 1896.]

STREET RAILWAY.—Negligence of Driver.—Willful Injury.—Evidence that the driver of a street car slowed up the car at the signal of the plaintiff who was on the car with a friend; that the friend safely alighted while the car was in motion; that while plaintiff was on the platform waiting for the car to stop before getting off, the driver struck the mules with a whip, giving the car a sudden jerk, throwing plaintiff off, is not sufficient to support a charge of willful injury in the absence of proof that the driver knew at the time of striking the mules and starting the car that plaintiff had not alighted from the car. *pp. 432-435.*

SAME.—Willful Injury of Passenger.—To entitle one to recover for an injury without showing his own freedom from contributory negligence, the injurious act or omission must have been purposely and intentionally committed, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation. *p. 435.*

SAME.—Instruction to Jury.—Accident.—An instruction to the jury that if plaintiff was injured as alleged and the injury was accidental, defendant would not be liable, is not erroneous where the whole instruction shows that the word "accidental" was used in the popular sense to signify something resulting undesignedly and without the fault of either party. *p. 437.*

NEGLIGENCE.—Instruction.—Question of Law.—In an action for personal injuries resulting from alleged negligence of defendant, an instruction that it is for the jury to determine whether the acts of the defendant, if established, "under all the circumstances amounted to negligence," is not objectionable as authorizing the jury to de-

146	430
146	502

146	430
149	499
149	500
151	595

146	430
158	277

146	430
163	453

146	430
171	405

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cide a question of law, where the court by other instructions had defined what it takes to constitute negligence. p. 438.

SAME.—Street Railway.—Passenger.—Contributory Negligence.—Instruction.—An instruction to the jury that a street car company, as a common carrier, is bound to the highest degree of care for the safety of passengers, and that such company is liable for injury to a passenger caused by the failure to exercise such care, provided such passenger was not guilty of contributory negligence, is not erroneous because it fails to add an unrequested charge that only ordinary care is required of the passenger. p. 440.

INSTRUCTIONS TO JURY.—When Not Reviewable on Appeal.—When it is not shown by the record that all the instructions given by the trial court are in the transcript, the refusal of the court to give certain instructions offered is not reviewable on appeal. p. 441.

EVIDENCE.—Custom May be Shown as a Fact.—A custom or usage is a fact that may be stated by a witness in the first instance without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom. p. 442.

RAILROAD.—Duty of Passenger.—It is the duty of one about to take passage on cars to ascertain for himself whether the rules of the carrier will permit a stop at a particular point where he may desire to get off. p. 443.

HARMLESS ERROR.—Evidence.—It is harmless error to reject admissible evidence where it is clear that the admission of the evidence would not have changed the result. p. 444.

SAME.—Rejected Evidence.—The rejection of proper evidence is harmless where other questions were afterwards put to the same witness in better form that elicited all the testimony that the rejected question could have elicited. p. 444.

From the Marion Superior Court. *Affirmed.*

T. E. Johnson, for appellant.

Mason & Latta, for appellee.

MCCABE, J.—The appellant sued the appellee to recover damages for personal injuries, alleged to have been inflicted on appellant through the negligence of the appellee, as charged in some of the paragraphs of the complaint, and purposely inflicted, as also charged in the third paragraph, claiming \$12,000.00 damages. The issues joined were tried by a jury, resulting in a

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verdict for the defendant, upon which the court rendered judgment, overruling appellant's motion for a new trial.

The only error assigned calls in question the action of the trial court in overruling appellant's motion for a new trial. The giving and refusing of certain instructions are specified as grounds for the motion for a new trial. The first instruction complained of is No. 1, given by the court on its own motion. It told the jury that: "The complaint in this case is in three paragraphs. The third paragraph, which charges a willful injury, is not supported by the evidence, and you are therefore instructed not to consider the third paragraph of the complaint." It is insisted that this was error, because it is claimed that the evidence was sufficient to warrant the jury in drawing the inference that the appellant's injury was purposely and willfully committed.

The appellant's testimony shows that he was a passenger on appellee's street car, being drawn by mules, and that he had paid his fare and the fare of his friend, Mr. Beck, ten cents; that he signaled the driver, there being no conductor, to stop at a certain point where he and his companion desired to get off; that the car slowed up and he and Mr. Beck started out on the platform to get off, and Mr. Beck stepped off, though the car had not come to a full stop; that before appellant had reached the platform Beck had got off. Appellant testifies that he got ready himself to step off, but the car did not come to a standstill, it kept moving very slow, though he thought every instant it would stop, but instead, the driver struck the mules and surged it forward, and he said, "I lost my balance and fell."

There is no evidence that the driver knew that appellant had not got off, at the time he struck the mules

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and started the car faster. It may be justly said that it was the driver's duty to know whether the passenger had got off in safety before starting up the car faster. Indeed, it was his duty to stop the car at the proper place long enough for passengers desiring to do so to alight in safety. Such failures and omissions, however, are nothing more than negligence, unless there was some evidence of knowledge on the part of the driver at the time of striking the mules and starting up the car that appellant had not got off the car.

The rule applicable here was stated by Mitchell, J., speaking for the court in *Gregory, Admr., v. Cleveland, etc., R. R. Co.*, 112 Ind. at page 387, thus: "As a rule of evidence, the presumption that every person intends the natural and probable consequences of his wrongful or unlawful acts applies as well in civil as in criminal cases; hence, the unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences, and a willingness to inflict injury, by purposely and voluntarily doing an act, with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby. An act which in itself might be lawful becomes unlawful when done in a manner or under circumstances which charge the actor with knowledge that it will result in injury to some one. *Palmer v. Chicago, etc., R. R. Co., ante*, 250; *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376; *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51; *Belt R. R. Co. v. Mann*, 107 Ind. 89; *Pennsylvania Co. v. Smith*, 98 Ind. 42. * * *

"The right of the court to direct a verdict for the defendant, in case the plaintiff's evidence, giving it the most favorable construction it will legitimately bear,

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fails to establish any fact which constitutes an essential element in his right of action, is clear. [Citing authority.]

“The rule which governs in such cases is, substantially, that which controls where there is a demurrer to the evidence. If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant without submitting the evidence to the jury.”

That is practically what the instruction in question did. It amounted to directing the jury to find for the defendant as to the third paragraph of the complaint.

Palmer v. Chicago, etc., R. R. Co., supra, was a case where a deaf person was walking on the railroad track of the appellee, and his father, who saw the passenger train coming behind his son, ran ahead of the train waving his hat at his deaf son and making signals to him to get off the track. But the deaf son's face was not turned and he failed to see his father or the signals or the train running toward him from the rear. The train ran over and killed him. The engineer in charge of the engine testified that he saw both men, but did not see the father making signals to his son and did not know that the son or the foremost man was deaf. This evidence was not contradicted, the father testifying that he did not know whether the engineer saw the signals or not. It is there said, on page 260, that: “The fact that signals indicating peril are given and are seen by the engineer, plainly distinguishes the case from the class of cases represented by the *Terre Haute, etc., R. R. Co. v. Graham, supra*. Proceeding in defiance of such signals creates the constructive intention of which our cases

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speak, and makes the conduct of the wrongdoer willful. Such an act is not simply negligence; it is a wrong implying a willingness to inflict an injury.

“While we agree with appellant’s counsel upon the legal proposition as we have stated it, we cannot agree in their inference of fact, for we cannot assent to the conclusion that a jury might have inferred that the engineer saw the signals given by the father of the deceased.”

And so here we do not think that the jury could reasonably and logically draw the conclusion from the evidence above set forth, that the street-car driver knew, when he started up the car by striking the mules with his whip, that the appellant had not yet got off the car and was in a situation making it dangerous to appellant to so start up the car by striking the mules with his whip. To the same effect are *Louisville, etc., R. W. Co. v. Ader, supra*; *Louisville, etc., R. W. Co. v. Brana, supra*; *Belt R. R. Co. v. Mann, supra*; *Pennsylvania Co. v. Smith, supra*; *Citizens' Street R. R. Co. v. Willoebey*, 134 Ind. 563; *Bellefontaine R. W. Co. v. Hunter, Admr.*, 33 Ind. 335, 5 Am. Rep. 201.

The substance of the rule as established by the cases to which we have referred is, that to entitle one to recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation of those others. There must have been an actual or constructive intent to commit the injury. A constructive intent may be established by evidence showing a reckless disregard for the

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safety of others, and a willingness to inflict the injury complained of. Such action is willfulness. But willfulness implies knowledge on the part of the actor. *Parker, Admr., v. Pennsylvania Co.*, 134 Ind. 673; *Evans v. Pittsburgh, etc., R. W. Co.*, 142 Ind. 264. It is not necessary, however, to show the intention, either actual or constructive, to commit the particular injury which resulted. It is enough to show that some injury to another or others would naturally and probably result from the act complained of. Here the evidence most favorable to appellant shows that he rang the bell signaling the driver to stop the car at a given point. That the driver accordingly slowed up the car until it was going very slow, so that Mr. Beck alighted from the car without any difficulty before the appellant got out onto the platform. There is no evidence that the driver knew that appellant also wished to get off, nor was there any evidence that the driver knew that appellant paid both fares, there being no conductor and the ten cents, the two fares having been put in the box provided for its reception; there was nothing to indicate to the driver that both men wished to get off at the same place. There was no evidence to show that the driver knew that appellant was out on the platform, about to get off, when he struck the mules with his whip and started up the car. As before observed, it was his duty to know it, but his failure to observe the appellant's motions, he being eighty years old, may have been negligence, but did not indicate a willingness to inflict an injury upon the appellant. There could be no willfulness on the part of the driver unless he knew the situation of the appellant when he did the act complained of. Nor could the jury legitimately draw the inference, from the evidence recited, that he did know such fact. Because it was his duty to know the fact, affords no just ground

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for the jury to infer that he did know it. Therefore, the trial court did not err in withdrawing the third paragraph from the consideration of the jury.

The next instruction complained of is the fourth, given by the court on its own motion. The instruction is very long, and it is conceded that it states the legal liabilities and rights of the respective parties under the facts detailed in the evidence up to the last or closing sentence, reading as follows: "If the plaintiff was injured, as alleged in his complaint, and the injury was accidental, the defendant would not be liable." We are referred to *Nave v. Flack*, 90 Ind. 205, as authority holding such an instruction erroneous. That case involved an instruction refused, touching the question of negligence as applicable to the facts in that case. It was there said: "It is contended that the word 'accident' qualifies the instruction and makes it correctly express the law. We do not think so. A pure accident, where there is an absence of negligence, will not supply a cause of action, but where the accident is attributable to the negligence of the defendant, it is otherwise. *Sherman & Redf. Neg.*, section 5. The poverty of language compels the use of words in different meanings, and this is notably true of the word 'accident.' Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men. *Browne Jud. Interp.* 4. The use of the word 'accident' does not save the instruction before us."

There was enough in the instruction in the case now before us, preceding the part we have quoted, to require the jury to find for the plaintiff, if the accident was caused by the defendant's negligence.

In its popular sense the term "accident" signifies an

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would have been rape. It is, therefore, the opinion of this court that the ruling of the trial court was erroneous.

The judgment is reversed, with instructions to the circuit court to overrule the appellee's motion to quash the information.

CONNER v. THE CITIZENS' STREET RAILROAD COMPANY OF INDIANAPOLIS.

[No. 17,796. Filed December 17, 1896.]

STREET RAILWAY.—*Negligence of Driver.—Willful Injury.*—Evidence that the driver of a street car slowed up the car at the signal of the plaintiff who was on the car with a friend; that the friend safely alighted while the car was in motion; that while plaintiff was on the platform waiting for the car to stop before getting off, the driver struck the mules with a whip, giving the car a sudden jerk, throwing plaintiff off, is not sufficient to support a charge of willful injury in the absence of proof that the driver knew at the time of striking the mules and starting the car that plaintiff had not alighted from the car. pp. 432-435.

SAME.—*Willful Injury of Passenger.*—To entitle one to recover for an injury without showing his own freedom from contributory negligence, the injurious act or omission must have been purposely and intentionally committed, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation. p. 435.

SAME.—*Instruction to Jury.—Accident.*—An instruction to the jury that if plaintiff was injured as alleged and the injury was accidental, defendant would not be liable, is not erroneous where the whole instruction shows that the word "accidental" was used in the popular sense to signify something resulting undesignedly and without the fault of either party. p. 437.

NEGLIGENCE.—*Instruction.—Question of Law.*—In an action for personal injuries resulting from alleged negligence of defendant, an instruction that it is for the jury to determine whether the acts of the defendant, if established, "under all the circumstances amounted to negligence," is not objectionable as authorizing the jury to de-

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cide a question of law, where the court by other instructions had defined what it takes to constitute negligence. p. 438.

SAME.—Street Railway.—Passenger.—Contributory Negligence.—Instruction.—An instruction to the jury that a street car company, as a common carrier, is bound to the highest degree of care for the safety of passengers, and that such company is liable for injury to a passenger caused by the failure to exercise such care, provided such passenger was not guilty of contributory negligence, is not erroneous because it fails to add an unrequested charge that only ordinary care is required of the passenger. p. 440.

INSTRUCTIONS TO JURY.—When Not Reviewable on Appeal.—When it is not shown by the record that all the instructions given by the trial court are in the transcript, the refusal of the court to give certain instructions offered is not reviewable on appeal. p. 441.

EVIDENCE.—Custom May be Shown as a Fact.—A custom or usage is a fact that may be stated by a witness in the first instance without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom. p. 442.

RAILROAD.—Duty of Passenger.—It is the duty of one about to take passage on cars to ascertain for himself whether the rules of the carrier will permit a stop at a particular point where he may desire to get off. p. 443.

HARMLESS ERROR.—Evidence.—It is harmless error to reject admissible evidence where it is clear that the admission of the evidence would not have changed the result. p. 444.

SAME.—Rejected Evidence.—The rejection of proper evidence is harmless where other questions were afterwards put to the same witness in better form that elicited all the testimony that the rejected question could have elicited. p. 444.

From the Marion Superior Court. *Affirmed.*

T. E. Johnson, for appellant.

Mason & Latta, for appellee.

MCCABE, J.—The appellant sued the appellee to recover damages for personal injuries, alleged to have been inflicted on appellant through the negligence of the appellee, as charged in some of the paragraphs of the complaint, and purposely inflicted, as also charged in the third paragraph, claiming \$12,000.00 damages. The issues joined were tried by a jury, resulting in a

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same effect are *City of Franklin v. Harter*, 127 Ind. 446, and *Evans v. Adams Express Co.*, 122 Ind. 362.

In *Hudson v. Houser, Admr.*, 123 Ind., at page 320, it is said: "By the sixth instruction the court was requested to charge the jury that if the evidence established a certain state of facts, those facts, standing alone, did not constitute such negligence as to render the appellant liable.

"This instruction was properly refused for two reasons—it ignored the evidence of other facts and was calculated to mislead the jury. * * * * The second reason is that, under the evidence in the case, the question of negligence was a question of fact for the jury. See *City R. W. Co. v. Lec*, 50 N. J. L. 435 (7 Am. St. 798, and note); *Pittsburg, etc., R. W. Co. v. Wright*, 80 Ind. 231; *Ramsey v. Rushville, etc., G. R. Co.*, 81 Ind. 394; *Town of Albion v. Hetrick*, 90 Ind. 545; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Chicago, etc., R. R. Co. v. Hedges, supra*; *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381; *Evansvilll, etc., R. W. Co. v. Harrington*, 82 Ind. 534."

Under the rule established by these cases, it was not error to direct the jury to "determine if such [act of the driver established by the evidence], under all the circumstances, amounted to negligence." That was the exclusive province of the jury which the court had no right to invade. The court had already properly defined what it takes to constitute negligence, we presume, the record not showing the contrary. It was, therefore, the exclusive province of the jury to determine whether, under all the circumstances, the act of the driver amounted to negligence according to the legal definition of negligence given them by the court.

It is also urged that the superior court erred in the fourth instruction, already mentioned, in another particular. In it the jury were told that the street-car

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company was a common carrier, and was bound to the use of the highest degree of care for the safety of passengers, from the time they enter the car until they leave it, and that such company was liable for an injury to a passenger caused by a failure to exercise such care, provided that such passenger was not guilty of any fault or negligence on his part which contributed to the injury. The objection to the instruction is, that it did not go further and tell the jury that the care required of the passenger in order to exonerate him from contributory negligence was not of the same high degree required of the carrier, but that the law only required of the passenger ordinary care. The instruction was not erroneous as given, and would not have been erroneous by the addition, the absence of which is complained of. If appellant was fearful that the jury would construe the instruction to mean that the same degree of care was required of the passenger as is required of the carrier, as he now insists they may have done, then he should have asked an instruction removing the possibility of mistake in that respect. This he failed to do. He is, therefore, not in a situation to successfully urge that the court erred because the jury might have made a mistake and misconstrued the instruction.

It is next urged, at great length, that the superior court erred in refusing to give to the jury a series of eight instructions asked by the appellant.

There is nothing in the record to show that the instructions that appear in the transcript as having been given by the court are all the instructions that the court gave to the jury.

For aught that appears the refused instructions may have been refused because the court had already fully instructed the jury upon the points involved in the offered instructions. In that case it would be no

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error to refuse them, even though they each stated the law correctly as applicable to the case. We are bound to presume in favor of the ruling of the trial court, if any legal reason may have existed justifying the action of the court, unless that reason is affirmatively shown by the record not to exist. *Ohio, etc., R. W. Co. v. Buck*, 130 Ind. 300; *City of New Albany v. McCulloch*, 127 Ind. 500; *Lehman v. Hawks*, 121 Ind. 541; *Musgrave v. State*, 133 Ind. 297; *Stewart v. State*, 111 Ind. 554.

The sixth ground of the motion for a new trial is, that the court erred in overruling appellant's objection to a question on cross-examination of appellant's witness, George Abbott, as follows: "I will ask you if there has ever been a time in your knowledge of street railroading when the company had a custom of stopping on curves to let passengers get off or on the cars? Ans. No. sir; we would never stop at curves."

The only one of the objections made to the question at the time, that is now urged in appellant's brief is, that a custom is a conclusion from a group of facts; that the question did not call for a fact, but a conclusion. No authority is cited in support of the proposition that a custom or usage is not a fact, but a conclusion, and we know of none. A custom or usage is a fact that may be stated by a witness in the first instance without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom, the same as he may testify to the general reputation of a witness. 1 Green. Ev. (Redf. Ed.), section 128-129, (2d ed.), sections 148-152.

The next ruling complained of is made the fourth ground in the motion for a new trial, namely, overruling appellant's objection to a question put to him by his counsel, as follows: "Q. On Thursday, before

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you got hurt, when you rang the bell, as stated by you, state what the party in charge of the car did in reference to slowing up the car, if anything." On sustaining appellee's objection, appellant's counsel stated that: "We offer to prove in response to the question asked, that the driver in charge of the team and car, as soon as the bell was rung, slowed up and stopped the car for the plaintiff to alight therefrom, at or about the same point where the plaintiff was thrown from the car on Saturday."

This question had reference to the controversy in the case whether, by the rules of the company, cars were allowed to stop at all at the point where appellant attempted to get off, it being maintained by the appellee company that their rules did not permit cars to stop at that point. It is the duty of one about to take passage on cars to learn and ascertain for himself whether the rules of the carrier will permit a stop at a particular point where he may desire to get off. *White v. Evansville, etc., R. R. Co.*, 133 Ind., at page 487. And he has no right to rely on the statement of a ticket agent selling him a ticket for passage on such road that the train will stop at a given point, in the absence of any statement by such agent that the rules of the company allowed the train to stop at such point. Therefore, the act of another car driver of appellee stopping a single time at a point not permitted by the rules of the company, was of very little force as against the undisputed evidence that the rules of the company as to such stop were posted up in the car in printed letters large enough to be read by any one across the car, to the effect that that car would stop only at the farther crossing, that being a different place than that where appellant attempted to get off. The only ground on which it is claimed by appellant that the evidence ought to have been admitted is that it would

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tend to show that appellee had been in the habit of stopping at that point to let passengers off.

Even if such habit could have any effect in modifying the clearly established rule of the company on that point, we think the proof of a single act of the company can hardly be said to tend to establish such habit. As was said by Justice Field, in *Ins. Co. v. Foley*, 105 U. S. 354, "It would be incorrect to say that a man has a habit of anything from a single act." See *Lynch v. Bates*, 139 Ind. 206. The word habit is defined to be a fixed or established custom; ordinary course of conduct.

But conceding, without deciding, that the offered evidence was erroneously excluded, yet in view of all the evidence the result must have been the same if it had been admitted. It has often been correctly and justly held by this court that the rejection of admissible evidence which could not have changed the result is a harmless error. *Hanlon v. Doherty*, 109 Ind. 37; *Aufdecamp v. Smith*, 96 Ind. 328; *Bartlett v. Pittsburg, etc., R. W. Co.*, 94 Ind. 281. Hence, the error, if error it was to exclude it, was harmless.

The fifth ground in the motion for a new trial is sustaining an objection to a certain question put to the witness John Simmons. But whether right or wrong, the ruling proved harmless by reason of the fact that other questions were afterward put to the witness in better form that elicited all the testimony that the rejected question could have elicited.

We have gone over all the questions raised and presented by the assignment of errors and appellant's brief, and find no available error. Our labors have been unnecessarily increased by the fact that appellee's brief is missing from the files.

The judgment is affirmed.

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[No. 17,903. Filed December 17, 1896.]

146	445
158	680
146	445
161	448
146	445
165	70

DIVORCE.—Custody and Support of Minor Child.—Attachment for Contempt of Court.—Statute Construed.—The court may, under the provisions of section 1058, Burns' R. S. 1894 (1046, R. S. 1881), in decreeing a divorce, commit the custody of a minor child to the mother and require the father to contribute to the support of such child and upon failure of the father to comply with such order of court an attachment may be issued against him for contempt of court.

CONTEMPT.—Imprisonment.—Imprisonment for contempt of court in failing to pay money as ordered by the court is not imprisonment for debt within the meaning of the constitution.

From the St. Joseph Circuit Court. *Reversed.*

Wilbert Ward, for appellant.

MONKS, J.—On the 9th day of April, 1895, by decree of the St. Joseph Circuit Court, appellant was granted a divorce from appellee, and given the custody of their child, and in the final decree it was ordered and adjudged that appellee should pay to appellant, for the support of said child, the sum of \$2.50 per week, and that appellant should have the sole care and custody of said child until the further order of the court. Afterwards a copy of said decree, duly certified by the clerk of said court, was served upon appellee.

Appellee failed, neglected and refused to pay said allowance, or any part thereof, and in January, 1895, when there was due from appellee under said order \$90.00, appellant filed a written motion in the St. Joseph Circuit Court, setting forth said facts, and moved the court, thereon, to enter a rule against ap-

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appellee to show cause why an attachment should not issue against him for contempt of court in failing to pay said sum for the support of said child, as ordered by the court. The trial court overruled said motion and refused to enter such rule.

The only question presented by the record is, had the court below the power or authority to enforce the order to pay \$2.50 per week for the support of the child by an attachment for contempt?

Section 1058, Burns' R. S. 1894 (1046, R. S. 1881), provides that the court in decreeing a divorce shall make provision for the guardianship, custody, support and education of the minor children of said marriage.

It was in compliance with the requirements of the foregoing section of the statute that the court below ordered appellee to pay appellant \$2.50 per week for the support of the child, and that she have the custody and control of the child until the further order of the court.

That part of the decree, as to the custody of the child until the further order of the court, remained within the control of the court below, and is subject to revision or alteration from time to time upon the application of either party. *Bush v. Bush*, 37 Ind. 164; *Baily v. Schrader*, 34 Ind. 260; *Sullivan v. Learned*, 49 Ind. 252; *Williams v. Williams*, 13 Ind. 523; *Ryce v. Ryce*, 52 Ind. 64; *Joab v. Sheets*, 99 Ind. 328; *Dubois v. Johnson*, 96 Ind. 6; 2 Work's Pract., section 1392 and cases cited.

The court, under the statute, necessarily has the right to commit the custody of the children to either party to the exclusion of the other, or to commit them to the custody of others, and in this case the court had the power, if application had been made by either party, to modify the order in regard to the custody of the child and give the custody to appellee or to a

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stranger. If the court had this power, it necessarily follows that it also had the power, on application and notice, to modify the order in regard to the payment for support, not only as to amount, but as to the person to whom the same should be paid. *Cox v. Cox*, 25 Ind. 303. If the order were changed so as to give the custody to appellee or a stranger, the order requiring the payment for support to appellant could be modified and the money ordered paid to some one else. The person to whom money for support of a child is ordered paid by the court, receives it as a trustee, and can only expend the same for the benefit of the child.

It is well settled law that the circuit court has ample power and authority to punish for contempt any one who disobeys its orders made in any case where it has jurisdiction of the subject-matter and parties. *Kernodle v. Cason*, 25 Ind. 362; *Joab v. Sheets*, *supra*, and cases cited on p. 332; *Hawkins v. State*, 125 Ind. 570; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224. •

Attachment for contempt is one of the methods for enforcing the payment of interlocutory orders in divorce cases, final decrees for alimony and support in many jurisdictions. *Buck v. Buck*, 60 Ill. 105; *Andrew v. Andrew*, 62 Vt. 495; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; 2 Bishop on Marriage and Divorce, section 1092, and cases cited; Stewart Marriage and Divorce, section 378, and cases cited; 2 Nelson on Divorce and Separation, section 939, and cases cited. See section 1054, Burns' R. S. 1894 (1042, R. S. 1881); *Kernodle v. Cason*, *supra*; 2 Works Pract., section 1390; 1 Ency. Plead. and Pract. 437, 438.

Imprisonment for contempt of court in failing to pay money as ordered by the court is not imprisonment for debt within the meaning of the constitution. *Ex parte Perkins*, 18 Cal. 60; *Pain v. Pain*, 80 N. C. 322;

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2 Nelson Divorce and Separation, section 939; Stewart Marriage and Divorce, section 378.

The verified motion of appellant showed that appellee had failed to pay said allowance, or any part thereof, and had thereby disobeyed the order of the court. Upon this showing she was entitled to have the court issue the rule to show cause, as prayed for. The court therefore erred in overruling her motion and refusing said rule.

Judgment reversed, with instructions to issue a rule against Warren Stonehill to show cause, at a time to be fixed by the court below, why he should not be attached for contempt for a failure to pay the \$2.50 per week, amounting to \$90.00, as ordered by the court, and for further proceedings not inconsistent with this opinion.

PORTER, TRUSTEE ET AL. v. CAYLOR ET AL.

[No. 17,881. Filed December 18, 1896.]

BOND.—Bastardy.—A bond given by defendant to plaintiff in settlement of a bastardy proceeding, conditioned that the defendant would marry, live with, support and kindly treat the plaintiff as his lawful and wedded wife, is violated by the communication to the plaintiff, shortly after such marriage, of a loathsome disease, causing her much pain, and causing the premature birth of her child.

HUSBAND AND WIFE.—Cruelty.—Desertion.—When a wife by the cruelty of her husband is driven from their home, the law does not regard this as desertion on her part.

From the Delaware Circuit Court. *Reversed.*

Gregory & Silverberg, for appellants.

HOWARD, J.—On July 26, 1893, the bond and mortgage sued on in this case were executed by the appel-

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lees in favor of Pearl M. Phipps, now the appellant Pearl M. Caylor, wife of the appellee, Harry Caylor. The said Harry Caylor was at the time in jail, awaiting the action of the circuit court upon a charge of bastardy, preferred by the said Pearl M. Phipps, now Caylor. By way of compromise, it was then agreed between the parties that the bastardy suit should be dismissed on condition that said appellee, Caylor, should marry said appellant, Phipps, and that both said appellees should execute to her a bond, secured by mortgage on real estate, the bond to be in the sum of \$500.00, liquidated damages, as security that he would enter into said marriage and faithfully keep his vows, particularly binding him to "live with and support and kindly treat the said Pearl M. Phipps as his lawfully wedded wife, for the full term of ten years, unless prevented by death."

In pursuance of said agreement and the execution of the bond and mortgage, the bastardy proceedings were dismissed and the parties became husband and wife. They lived together until September of the same year; soon after which, it is alleged, the conditions of the bond were violated, and this action was brought to recover the damages provided for in the bond and for the foreclosure of the mortgage. The appellant, Porter, appeared for the appellant, Pearl M. Caylor, as trustee and next friend; the record showing that at the time she became pregnant by the act of the appellee, Caylor, as charged, she was as yet but a school girl and not fifteen years of age.

The cause was submitted to the court for trial, and there was a special finding of the facts with conclusions of law. The court found the facts in issue substantially as stated in the complaint: That Pearl M. Phipps, now Caylor, was at the date of the bond and

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mortgage unmarried, of the age of fifteen years and living with her parents in the city of Muncie; that she was then pregnant with a bastard child, of which the said Harry Caylor was the father; that he had been arrested and committed to jail on said charge; that the compromise was entered into, by the terms of which the bond and mortgage were executed, the suit dismissed and the parties married; that they lived together until September 1, 1893, when the wife went to her parents' home; that on September 28 she gave birth to the child, which died in a few days; that at the date of the marriage the husband was afflicted with a venereal disease, which, within two weeks thereafter, he communicated to his wife, and from which she suffered continuously until some time after the birth of her child; and that said disease caused the premature birth of said child. The court also found that when the said wife left her husband and returned to the home of her parents, "it was not because of any abuse or mistreatment of said Harry Caylor toward her, but because she was not satisfied with the home and other provisions the said Harry Caylor had made for her." Still other findings, but immaterial to the issues, were made; and the court concluded, as a matter of law, "that the plaintiffs are entitled to take nothing by this suit."

We do not think the conclusions of law were justified by the findings. One of the facts found is an intimation that the wife abandoned her husband; and we presume that it was upon this chiefly that the conclusions of law were based. The finding in question is rather a conclusion of fact, and is itself inconsistent with the facts in issue and expressly found by the court. Two weeks after their marriage the husband communicated a loathsome disease to his wife, from which she continuously suffered thereafter. The

enormity of this conjugal offense was intensified by the circumstance that the wife was then in the delicate state caused by approaching maternity, to say nothing of her being but a child herself; and if ever the condition of the bond, that the husband should "support and kindly treat" his wife, should apply, it was then, when she was about to become the mother of his child.

"The husband's cruelty," says Mr. Bishop, *Marriage and Divorce* (6th ed.), section 741, "is aggravated by the woman's being in pregnancy. Also, by her being of advanced age; [or, we might add, of tender age], for 'there may be relative cruelty, and what is tolerable by one may not be by another.'" Yet it is quite impossible to conceive that the particular cruelty indulged in in this case could be tolerable by any one. In this case, too, not only the suffering of the mother, but the premature birth and speedy death of the child were direct results of this cruelty. The wife did not desert the husband. His conduct drove her forth.

As said in the vigorous language of Judge Lotz, in *Carr v. Carr*, 6 Ind. App. 377, "Although the evidence in this case shows that the wife left the defendant, it was under such circumstances that made him, and not her, the deserter." And the learned judge continues: "His conduct was not only vile, but it was infamous. It was bad enough for him to violate his marital vows, but when followed up by inoculating the wife with a loathsome disease, the depths of infamy had been sounded. The law does not require that the wife shall abase herself to the extent of condoning the adulterous conduct of the husband, much less is she required to jeopardize her health and life in order that she may receive food, raiment and shelter from his iniquitous hand. She is entitled to enjoy his good fortunes, and bound to share his misfortunes, but she

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is not required to share his ignominy and shame, or to imperil her life and health on account of his wrongdoing."

"For a husband knowingly to communicate venereal disease to his wife," says Mr. Bishop, in the work already cited, section 735, "is adequate legal cruelty; and, in aid of the necessary proofs of knowledge, the presumption will be, that he was aware of his own diseased condition and the danger of infection." See also definition of cruelty as to husband and wife, as quoted from the same text writer by Judge Worden in *Small v. Small*, 57 Ind. 568.

That the conditions of the bond in suit were violated, and that the appellants were entitled to recover, there can be no doubt. A case in form and substance much like the case at bar, and in which the acts of the husband, in the violation of the conditions of the bond given his wife, were less reprehensible, was that of *Stanley v. Montgomery*, 102 Ind. 102, appealed for the second time and decided in favor of the wife in *Stanley v. Stanley*, 112 Ind. 143.

The judgment is reversed, with instructions to the court to restate its conclusions of law and to enter judgment for the appellants.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
Co. v. OSTMAN, ADMINISTRATRIX.

[No. 17,434. Filed December 22, 1896.]

NEGLIGENCE.—Master and Servant.—In an action based upon negligence it must be shown that the master was guilty of the negligence charged and that the servant was free from contributory negligence at the particular time of the alleged injury.

SAME.—Railroads.—Maintaining Cattle Chute in Close Proximity to Sidetrack.—The correct standard by which the negligence of a rail-

146	452
152	598
146	452
170	35
146	452
171	314

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road company is measured, in an action for an injury to one of its trainmen arising out of its alleged negligence in maintaining a cattle chute in too close proximity to its tracks, is whether same is dangerous to persons operating its trains, when they are exercising, under the particular circumstances, ordinary care.

MASTER AND SERVANT.—Railroads.—Contributory Negligence.—A locomotive fireman who, while in the discharge of his duties as such fireman was leaning out of the window of the cab and looking backward for signals, struck his head against a cattle chute which stood 18 inches from the cab window and was killed, is chargeable with a knowledge of the dangerous proximity of said chute to a passing engine and was guilty of contributory negligence in leaning out of the cab while passing said chute, where it is shown by the special finding of the jury that he had been in the employ of the defendant for 16 months and had passed the cattle chute twice each week during such time and had frequently done switching at such point and was familiar with the printed rules of the company which enjoined upon the employes to take time in all cases to do their duty in safety whether at the time acting under orders of a superior or otherwise.

From the Allen Circuit Court. *Reversed.*

Morris, Bell, Barrett & Morris, for appellant.

Ninde & Ninde, for appellee.

JORDAN, C. J.—Appellee commenced this action in the lower court to recover damages of appellant, arising out of the death of her decedent, Charles Ostman, by reason of the alleged negligence of the railroad company. The deceased was the husband of appellee, and the fatal accident which resulted in his death, occurred on April 8, 1891, at Burr Oak, a station on appellant's line of railway. There was a special verdict returned by the jury, upon which the court rendered its judgment, in favor of the appellee, for \$4,000.00, the amount assessed by the jury. Among the errors assigned by the appellant is one based upon the action of the court in awarding a judgment to appellee, under the facts set out in the special verdict.

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From the special verdict the following facts appear:

"The defendant owned and operated a railroad, running from the city of Buffalo, in the state of New York, through the city of Fort Wayne and the town of Burr Oak, in the State of Indiana, to the city of Chicago, in the state of Illinois; that the deceased for eighteen months prior to his death was in the employ of the defendant as a locomotive fireman, and for sixteen months prior to his death said deceased was employed by said defendant as fireman on its engine 169, and continued to be so employed till his death, as hereinafter set forth; that during said period said deceased, in the discharge of his duties, passed said station at Burr Oak twice each and every week, and frequently did switching and work at said station; that during all said period the defendant had a side track and spur switch at said town of Burr Oak, both of which were located north of the main track of said railroad; that said side track was about 800 feet long, the east switch of which was about 400 feet east of the cattle chute, hereinafter described, and the west switch of which side track was west of the depot, hereinafter described; that at said point, 450 feet west of said east switch, the defendant had maintained, near to and on the north side of said side track, cattle pens, from which there was a cattle chute about eighteen feet long leading from said pens so near to the track that by the aid of fences, gates and doors, the stock was driven from said pens into the defendant's cars to be transported; that said chute was constructed as follows: Three oak posts six inches square were planted in the ground about equally distant from the north rail of said side track. Said posts were eleven feet six inches high. One of said posts was located on the west side of said cattle chute, and one about the middle, and one on the east side thereof; that a fence was

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constructed from each of said posts north to said cattle pens; that said fence from the said middle post north to the cattle pens divided said chute into two parts; that by means of said middle fence the said chute between it and said west fence was six feet and two inches wide, and the chute between said middle fence and the east fence was the same width; that said fence was constructed of pine boards six inches wide and six inches apart; that a gate was constructed out of pine boards, so that the boards of said gate were so adjusted to said fence that each board of the gate was located in each space between the boards of the fence, and said gate was about eighteen feet long and three feet six inches wide, and was operated by being pushed towards and from the car to be loaded. At the north end of the gate was a board or batton nailed across the ends of the gate boards to hold them in place, and on the west side of the south end of the gate was a similar board nailed across the ends of the boards of the gate and on the east side of the gate and fence were boards nailed so as to allow the gate to move north and south along the spaces between the boards of the fence. The said board so nailed across the south ends of the gate boards, was placed on the west side of the gate so that when the gate was shoved northward the north edge of said board would strike the face of said post, and prevent said gate from slipping back till the south end thereof was back flush with the south face of the post, but because of said board striking said post the south end of the gate, at the time the deceased was killed, was six inches further south than the post, and six inches nearer the track than said post; that the south face of said post was, at the time said deceased was killed, thirty-eight inches north of the center of the top of the north rail of said side track, and the south end of said gate, at

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the time said deceased was killed, was thirty-five inches north of the said center of said rail; that the cab of said engine is eight feet and six inches wide; that the distance between the north side of said cab, at the window thereof, where deceased was looking out, and the part of said cattle chute his head came in collision with, was thirteen inches; that said distance between said cab and said cattle chute made the said cattle chute so placed extra hazardous for the deceased and other trainmen of said defendant; that the deceased did not know, nor have any reason or opportunity to know that any part of said chute was within said distance of thirteen inches of said cab as it passed the same, but that the defendant and its proper agents and servants did know that said chute was said distance from the cab window as it passed said chute; that said chute had for a long time, to-wit: for several years before the deceased was killed, come in collision with parts of the defendant's trains as they passed the same, and frequently knocked off markers from cars and collided with brake wheels attached thereto; that said defendant had notice of said facts, and that said chute was the distance aforesaid from said cab and track as they passed the same, long enough before the deceased was killed to have removed the same to a safe distance from the trains passing the same, and yet during all said time before and up to the time said deceased was killed, the defendant negligently failed to remove the same, but negligently maintained the same at said dangerous distance from said track and cabs as they passed the same; that the said cattle pens and chute could be seen for a distance of one-half mile or more along the track each side thereof; that when deceased was killed he was firing on said engine 169, which was then and there pulling a local freight train eastward over said rail-

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road; that it became and was necessary to take a car then standing on said spur switch into said train, which was coupled onto said engine at the west end of said side track, and was being pulled out over said side track eastward and past said cattle chute at the time said deceased was killed, at the rate of about ten miles per hour; that while said train was so moving eastward over said side track, it became and was then and there the duty of said deceased to lean out of said cab window on the north side of said cab, and look backward for signals and to see if everything was all right.

“And the said deceased was then and there at the time he was killed, carefully, and in the proper discharge of his duty, looking out of said window, and looking back for said signals, and to see if everything was all right at the time his head and part of his shoulders were partly inside said window and partly outside thereof, so that as he passed said chute his head came in collision with said cattle chute, whereby his skull was mashed in and broken and said deceased was killed; that he died within a few minutes after he so struck said cattle chute, and we, the jury further find that the board so nailed on the west side of the south end of said gate was longer up and down by the space of two inches than the said gate was wide, and that the upper end of said board was two inches higher than the upper edge of said upper board of said gate, and that said board was so placed upon the south end of said gate that the south edge thereof was from a half inch to one and one-half inches further south than the south end of said boards of said gate.

“That the top end of said board was further south than the lower end thereof by the space of one inch; that when said deceased was looking out for signals and to see if everything was right, as aforesaid, and as

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he passed said cattle chute the back of his head struck the outer edge of said board so nailed across the south end of said gate, as aforesaid, by which collision he was killed, as aforesaid.

“That at the time said Ostman was employed as fireman on the defendant’s road, to-wit: eighteen months prior to April 8, 1891, said defendant railroad company delivered to said Ostman, and said Ostman received and familiarized himself with its books and rules and instructions, and at the time of his injuries, on April 8, 1891, he knew and was familiar with the same.

“That there was in force on defendant’s road, as shown by said book of rules and instructions, at the time of the employment of said Ostman, and continuously to a time subsequent to April 8, 1891, the following rules:

“‘First. All persons entering into or remaining in the service of this company, are warned that in accepting or obtaining employment they must assume the risk attending it. Each employe is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, to the public and to property, especially in switching cars and in all movements of trains.

“‘Second. Employes of every grade are warned to see for themselves before using them that the machinery or tools which they are expected to use are in the proper condition for the services required, and if not, to put them in proper condition, or see that they are so put before using them; also train and enginemen must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employes to incur any risk whatever from which, by the exercise of their own judgment and by

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personal care they could protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of a superior or otherwise.

“‘Fourth. They must assist in keeping a constant lookout upon the track and must instantly give the enginemen notice of any obstruction or signal they may perceive.’

“And we futher find that said deceased did not know that said cattle chute was so close to said track, or to his cab as it passed the same, as to be dangerous to him, or that it would come into collision with him as he passed the same, and while he was discharging his duties as such fireman.

“And we, the jury, further find that said deceased was so injured and killed without any fault whatever on his part.”

It is further found that the deceased was twenty-five years of age at the time of his death.

Appellant affirms that under the special findings of the jury that appellee was not entitled to a judgment, and this may be considered the principal question for our determination. The particular insistence is, that the facts as found by the jury do not establish actionable negligence against appellant, nor neither do they show absence of contributory negligence upon the part of the deceased servant at the time of the fatal accident. It is well settled by numerous decisions of this court that in actions of this character, whenever the plaintiff sues to recover upon the ground of negligence, it must be shown that the master was guilty of the negligence charged, and that the servant was free from the contributory negligence on his part, at the particular time of the alleged injury or death.

Neither of these essential factors can, to any extent, be presumed. The special verdict in the case at bar is

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open to the objections that in some respects it contains conclusions rather than the finding of facts essential to the issues involved.

The theory of the verdict is, that the negligence to be imputed to the appellant, under the facts embraced therein, is that of erecting and maintaining the cattle chute in too close proximity to its side track. There is nothing disclosed in the findings of the jury going to show that the chute in question was not built and maintained in the usual and proper place for such buildings. It is a matter of general knowledge, that such chutes are necessary contrivances in the operation of railroads, and that they must necessarily be constructed close enough to the track where used as will enable the company to load and unload cattle without injury to the latter. It would seem that the correct standard by which the negligence of the railroad company ought to be measured when the action is for an injury or death to one of its trainmen, arising out of its alleged negligence in erecting or maintaining a chute in too close proximity to its tracks is, that it must be, when so erected or maintained, dangerous or unsafe to persons operating its trains when they are exercising, under the particular circumstances, ordinary care.

In the case of *Gould, Admr., v. Chicago, etc., R. W. Co.*, 66 Ia. 590, 22 Am. and Eng. R. R. Cases, 289, 24 N. W. 227, an engineer was killed by being struck upon the head by a "water crane," close to the track, while in the act of leaning out of the "gangway" of his engine, looking back for expected signals. The trial court charged the jury that, if they found from the evidence that the water column was placed in such close proximity to the track as to be dangerous to persons operating the trains, they would be justified in finding that the defendant was guilty of negli-

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gence in the erection and location of the column. The court held that the giving of this instruction was error, and said: "It is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things for use in the operation of their roads, for the reason that they are 'dangerous to the persons operating the trains.' Indeed, the whole business of operating trains is 'dangerous.' It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the things from which the danger springs. The instruction should have expressed the thought that if the crane was dangerous to persons operating trains *in the exercise of ordinary care*, the defendant was negligent in constructing it."

The jury found that the part of the chute that struck the head of the plaintiff's intestate while he was looking out and back was "thirteen inches from the side of the cab at the window from where he was looking out; * * * that said distance made it extra hazardous for the deceased and other trainmen. That the deceased did not know or have any reason or opportunity to know that any part of said chute was within thirteen inches of said cab as it passed the same." The finding that this distance between the particular point of the chute that struck the head of the deceased and the side of the cab when it was passing the chute, rendered the same extra hazardous, is more in the nature of a conclusion than the finding of a material fact, and for this reason must be disregarded in determining the sufficiency of the special finding.

While we have asserted the general rule applicable to the test or question of the negligence of the company, when it is involved, as it is in the case under consideration, we may, however, pass without deciding whether the appellant was guilty of actionable neg-

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ligence under the findings of the jury, as it does not appear, from the facts embraced in the verdict, that the deceased was himself free from contributory negligence at the time of the fatal accident. It is shown that before the time of the occurrence Ostman had been for sixteen months and over continually in the employment of the appellant as its fireman upon the same engine upon which he was at work when killed. That the chute in question was so conspicuous that it, and its location, could be seen for a distance of a half mile and more along the track and each side thereof. That during this period of time the deceased, in the discharge of his duties, passed the station where the chute was located, twice each week, and frequently did work and switching at this station. He was twenty-five years of age, of sufficient age and capacity by the use of his senses to see, appreciate, and comprehend obvious dangers and thereby avoid them. The finding that the deceased did not have an opportunity to know that the chute was in such close proximity to the side track, in consideration of the other facts, must be viewed more as a conclusion upon the part of the jury than a finding of a material fact. He was, as it appears, familiar with and understood the rules of the company, and one of these rules expressly provided: "Also trainmen and enginemen must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employes to incur any risk whatever from which, by the exercise of their own judgment or by personal care they could protect themselves, *but enjoins upon them to take time in all cases to do their duty in safety, whether they may be at the time acting under orders of a superior or otherwise.*" (The italics are our own.)

Under this rule, deceased was required to familiarize

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himself with the tracks and dangerous points upon the lines, and it was not incumbent upon him to incur any risk from which, by the exercise of judgment and care, he could protect himself. This chute was not located upon the main track, but on the switch or side track at Burr Oak. As the deceased frequently did switching at this station, he consequently must have frequently passed this chute on the side track while switching, and thereby had ample opportunities to learn and be apprised of its close proximity to the track, and the danger of passing the same in his cab when leaning out and looking in an opposite direction from the chute, as it appears he did, and what care was necessary to be exercised to escape injury therefrom when passing it. The fact that the jury found that he did not know, and could not know, of the hazard to which he would be subjected in passing the chute in the manner he did, at the time of his fatal injury, has no bearing upon the question of care upon his part. It is a finding which is antagonized by the specific facts disclosed by the verdict, and we must accept them as controlling under such circumstances. In addition to the duty resting upon the deceased to employ or exercise his senses while on duty, he, by the express provisions of the rule above set out, was admonished and enjoined to do so, and to take time and to exercise care to protect himself from danger.

It is urged by the appellee that the facts show that her decedent did not know what distance the part of the chute which struck him was from the passing engine. In answer to this it may be said that the means of knowing by ordinary care is evidence of knowledge. *McKee v. Chicago, etc., R. W. Co.*, 83 Ia. 616; *Pennsylvania Co. v. Finney*, 145 Ind. 551.

In the former case it was held that a railroad employe in going over the line of the railroad in the dis-

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charge of his duties, will be presumed to have known from such opportunity that the distance between a wing fence and a passing car was such as to make it unsafe to swing out more than two feet from the car. In the latter case the alleged negligence was based upon the company having located and maintained a water crane in close proximity to its main track, whereby Finney, who was a brakeman in its service, was killed by being struck by the crane while descending from the car upon which he was braking. The employe in this case was twenty-two years of age, he had been in the service of the company for a period of six months, during which time he had passed the crane almost daily. It was held by this court that, under the facts in that case, the deceased was chargeable with contributory negligence. The court said: "Everything, as it appears, was open and visible to the decedent; he was a man twenty two years of age, and had he used his senses and faculties with which it is presumed nature had endowed him, we think, he would have escaped the danger to which, it is contended, appellant had exposed him. The means which a person has of knowing that under the circumstances he will expose himself to peril, are deemed, in law, to be evidence of knowledge of that fact. *Muldowney v. Illinois, etc., R. W. Co.*, 39 Ia. 615; *McKee, Admr., v. Chicago, etc., R. W. Co.*, 83 Ia. 616, 13 L. R. A. 817.

"In *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, this court said: 'The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, and is injured in consequence, he alone must suffer the consequences.' See *Salem, etc., Stone Co. v. O'Brien*, 12 Ind. App. 217.

"In no case will the master be held liable to the

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servant where the latter brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151."

The facts in the Finney case, *supra*, are similar in their character to those in this appeal, and the holding in that case is virtually decisive upon the question here involved.

In the case of the *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, it is said: "‘An employe who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby.’" (The italics are our own.) See *Lovejoy v. Boston, etc., R. R. Corp.*, 125 Mass. 79; *Brown v. Chicago, etc., R. W. Co.*, 69 Ia. 161, 28 N. W. 487.

We are of the opinion that, under the facts as they are disclosed by the finding in this case, knowledge of the hazard or danger to which it is claimed by the appellee that her intestate was subjected and exposed by reason of the location of the cattle chute and the manner in which it was maintained, must be imputed to him. It is not made to appear by any reasonable inference that may be drawn from the specific facts found, that there was freedom from contributory negligence upon the part of the deceased, at the time of the accident. The special verdict does not support the judgment.

The judgment of the lower court is therefore reversed, and the cause remanded, with instructions to

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the court to vacate its judgment and render a judgment in favor of appellant upon the special verdict.

DISSENTING OPINION.

HOWARD, J.—I think that the facts found by the jury show that the company was negligent and that the deceased was free from contributory negligence, and must therefore dissent from the conclusion reached by the court.

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[No. 17,596. Filed December 22, 1896.]

MUNICIPAL CORPORATIONS.—*Limitation of Indebtedness.*—A contract by a city for a fire alarm system, at a time when the city was indebted more than 2 per cent. on the assessed valuation of its taxable property, is void under the provisions of Art. 13 of the constitution limiting municipal indebtedness to 2 per cent. of the value of the taxable property, where such city had no money in the treasury to pay for such system either at the time the contract was made or when same was completed and accepted, although there were sufficient funds on hand to pay for it at the time fixed by contract for such payment.

SAME.—*Municipal Indebtedness.*—Where a municipal corporation contracts for a usual or necessary thing and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, as such indebtedness does not come into existence until it is earned.

SAME.—*Municipal Indebtedness.—Current Expenses.*—When the current revenues of a city are sufficient to pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred; but a debt for current expenses cannot be made beyond the constitutional limit.

SAME.—*Municipal Indebtedness.—Payable Out of a Particular Fund.*—Municipal obligations payable out of a particular fund, and for which the fund only and not the municipality is liable, are not within the inhibition of Art. 13 of the constitution limiting municipal indebtedness to 2 per cent. of the value of the taxable property.

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STATUTORY CONSTRUCTION.—*Clause Taken From Statute of Other State.*—Where a clause is taken from the constitution or statute of another state it will be deemed to have the meaning given it by the courts of that state.

From the LaPorte Circuit Court. *Reversed.*

W. B. Biddle and *J. H. Bradley*, for appellant.

Andrew Anderson, for appellee.

MONKS, J.—This action was brought by appellee, against appellant, to recover the contract price of a fire alarm system furnished by appellee.

The court, at the request of the parties, made a special finding of facts and stated as a conclusion of law thereon, that appellee was entitled to recover the contract price. To this conclusion of law appellant excepted. The assignment of errors calls in question the conclusion of law.

It appears, from the special finding, that on August 5, 1890, appellee entered into a contract with appellant to furnish and put in complete working order appellee's system of fire alarm, for the sum of \$3,500.00, to be paid May 1, 1891. The contract provided that when said system was completed appellant should accept the same and deliver to appellee a certificate to that effect. The work was completed and accepted by appellant December 18, 1890. At the time of entering into the contract, and until May 1, 1891, appellant was indebted, not including appellee's claim, over \$5,000.00, more than two per cent. on the assessed value of its taxable property. At the date of said contract \$2,639.90 was on hand in the city treasury. When the work was completed and accepted there was on hand in the general fund \$359.00. On May 1, 1891, there were \$10,328.80 in the city treasury belonging to the general fund collected from the duplicate of 1890. On June 30, 1890, the common council of appellant, by

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resolution duly passed, ordered that a tax of \$1.05 on each hundred dollars of valuation of taxable property be levied, 74 cents for general purposes and 31 cents for the purpose of paying \$5,000.00 of the city debt and the interest on the city debt. That the amount of said levy was \$31,285.00. No specific levy was ever made for the purpose of meeting any indebtedness to appellee.

On June 22, 1891, the common council passed a resolution, declaring "that \$3,532.68 be set aside out of the general fund for the purpose of paying the order drawn in favor of the Gamewell Fire Alarm Telegraph Company, which was ordered drawn May 25, 1891, by the common council, and which the mayor refused to sign."

Appellant earnestly insists that by the contract sued upon appellant become indebted to appellee, and that the same was void under the provisions of Art. 13, of the constitution, for the reason that appellant was already indebted in excess of the amount allowed by said article.

Article 13, of the constitution, adopted in 1881, is as follows: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void: *Provided*, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and in value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection

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and defense to such an amount as may be requested in such petition.”

This clause in our constitution is in legal effect, the same as that of Iowa, and was no doubt taken from the constitution of that state. It is a familiar rule that where a clause is taken from the constitution or statute of another state it will be deemed to have the meaning given it by the courts of that state. Under this provision every indebtedness incurred “in any manner or for any purpose” is within the prohibition. *Council Bluffs v. Stewart*, 51 Ia. 385, 1 N. W. 628; *Scott v. City of Davenport*, 34 Ia. 208; *Grant v. City of Davenport*, 36 Ia. 396, 401; *French v. City of Burlington*, 42 Ia. 614; *Anderson v. Orient Fire Ins. Co.*, 88 Ia. 579, 55 N. W. 348; *Brown v. City of Corry*, 175 Pa. St. 528, 34 Atl. 854; *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651; *Doom Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820; note to *Beard v. Hopkinsville*, 23 L. R. A. 402-408; note to same case, 44 Am. St. 229-243.

The controlling question in this case is, do the facts found show an indebtedness of appellant within the inhibition imposed by the foregoing article of the constitution?

A debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *State v. Hawes*, 112 Ind. 323; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Crowder v. Town of Sullivan*, 128 Ind. 486.

It is the rule in this State that when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it an-

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nually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's, or month's compensation is essential to the existence of a debt. *Crowder v. Town of Sullivan, supra*, and authorities cited; *City of Valparaiso v. Gardner, supra*, and cases cited; *Foland v. Town of Frankton*, 142 Ind. 546, and authorities cited; *Seward v. Town of Liberty*, 142 Ind. 551, 554; 1 Dillon on Munic. Corp. (4th ed.), section 136a; *Wade v. Oakmont Borough*, 165 Pa. St. 479; *Brown v. City of Corry, supra*.

If the city can pay this indebtedness when it comes into existence without exceeding the constitutional limit there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created and there is a violation of the constitution. *City of Valparaiso v. Gardner, supra*; Dillon on Munic. Corp., section 136, 136a; *Appeal of the City of Erie*, 91 Pa. St. 399.

It is also the law that items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like constitute current expenses payable out of current revenues. *Foland v. Town of Frankton, supra*, p. 550. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred. But a debt cannot be made beyond the constitutional limit, even for the current expenses mentioned, no matter how urgent. *Sackett v. City of*

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New Albany, 88 Ind. 473; *City of Valparaiso v. Gardner*, *supra*.

It is clear, therefore, that whenever a city whose indebtedness exceeds the constitutional limit, does not have the money on hand arising from current revenues to meet its debts of whatever character as they come into existence, whether for light, water, labor or any other expense, the city has become indebted and the constitution is violated.

It is not sufficient, however, merely to have on hand enough money to pay each indebtedness as it comes into existence, but the same must be paid as it comes into existence, or there must be enough money on hand to pay all of such indebtedness outstanding, or there will be an indebtedness created and the constitution be thereby violated.

If to avoid the constitutional inhibition it is only necessary to have on hand sufficient money to pay an indebtedness when it comes into existence, without paying or keeping on hand enough money to pay it, there would be no restraint upon the power of a municipality to become indebted.

Obligations payable out of a particular fund, and for which the fund only and not the municipality is liable, are not within the inhibition. *Quill v. Indianapolis* 124 Ind. 292; *Strieb v. Cox, Treas.*, 111 Ind. 299; *Board, etc., v. Hill*, 115 Ind. 316; *City of New Albany v. McCulloch*, 127 Ind. 500, 505; *Hitchcock v. Galveston*, 96 U. S. 341; *Galveston v. Heard*, 54 Tex. 420; *Davis v. City of Des Moines*, 71 Ia. 500; *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557.

The same rule applies to agreements to accept certificates of assessments in full satisfaction. *Davis v. City of Des Moines*, *supra*. But anything that renders

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the city liable brings the indebtedness within the restriction. *Fowler v. City of Superior*, 85 Wis. 411.

It is held in some states, under constitutional provisions substantially the same as ours, that a municipality which has reached its limit may anticipate the collection of the revenue appropriated to its use by drawing warrants against taxes levied but not collected, thus substantially appropriating and assigning the amount drawn to the holder of the warrant. *French v. City of Burlington, supra*; *Law v. People*, 87 Ill. 385; *City of Springfield v. Edwards*, 84 Ill. 626; *City of East St. Louis v. Flannigan*, 26 Ill. App. 449; *Koppikus v. State Capitol Commissioners*, 16 Cal. 248.

But in order to escape the inhibition of the constitution the tax must not only have been levied, but the warrant must be drawn payable out of the particular fund, and be such in legal effect as to discharge the municipality from all liability. *City of Springfield v. Edwards, supra*; *Law v. People, supra*; *Fuller v. City of Chicago*, 89 Ill. 282; *People v. May*, 9 Col. 404, 12 Pac. 838.

In *City of Valparaiso v. Gardner, supra*, p. 13, this court said: "If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness. * * * So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt; but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds."

Conceding without deciding that a fire alarm sys-

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tem is a necessary or ordinary annual expense of a municipality and essential to its existence, yet appellee's claim is within the inhibition of the constitution. In this case it is not material whether the indebtedness came into existence on December 18, 1890, when appellee completed the work and the same was accepted by appellant, or at the date of the contract, August 5, 1890. It is clear that the indebtedness came into existence December 18, when the work was completed and accepted, if not before. There was not sufficient cash in the city treasury to pay said indebtedness at that time, and the constitutional provision was violated. But it is urged that the debt was not payable until May 1, 1891, and that there was sufficient cash in the treasury to pay the same at that time. The rule is that the cash must be in the treasury to pay the same when the debt comes into existence, not when it becomes due. *City of Valparaiso v. Gardner, supra*. Otherwise the city could issue bonds for borrowed money or other existing indebtedness, or become so indebted in other ways far in excess of the constitutional limit, and by making the same payable in annual installments, and each year levying and collecting sufficient taxes to pay the same, avoid the constitutional inhibition.

It is claimed by appellee that under the law, as declared in *Brashear v. City of Madison*, 142 Ind. 685, appellant is liable, and the conclusion of law therefore correct. The case cited was brought to enjoin the city of Madison from entering into a contract with the appellee in the case for the erection and location of a fire alarm system in said city, for which the city was to pay when completed \$5,000.00; upon the ground that the city was indebted in excess of the constitutional limit. In that case this court held that it was shown by the allegations of the complaint that it was

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not proposed to create an indebtedness, but simply to make a cash purchase. In overruling the petition for a rehearing this court said: "The theory of the original opinion is, that to sustain the suit, the appellants were required to show that the maximum debt limit, as prescribed by the constitution, had been reached, and that the city was about to create an additional debt, and that they had failed to show this. This failure, it was held, was due to the fact that it was not proposed to create a debt, but simply to make a cash purchase, the city having in its treasury the funds with which to pay therefor."

Counsel for appellee cites *Powell v. City of Madison*, 107 Ind. 106. That was a suit to enjoin the officers of that city from issuing bonds to a certain amount, or any part of them, or in any manner borrowing money or creating a debt under and by virtue of an ordinance to fund the indebtedness of the city, set out in the complaint, upon the ground that the city was already indebted in excess of the constitutional limit. The city of Madison answered, admitting the indebtedness as stated in the complaint, but averred that the city did not intend to make use of, or to appropriate any of such bonds or any of the proceeds for which they might be sold, for the purpose of paying or extinguishing any part of the indebtedness of the city contracted since March 14, 1881, when section 13 of the constitution took effect; but solely and only to exchange such bonds for, or use their proceeds in payment of bonds of such city outstanding for debts incurred before that date. This answer was held to be sufficient by this court upon the ground that the new bonds, as provided for in the ordinance, would represent the debt that the bonds issued prior to March 14, 1881, represented, and that thus no new debt would be created. If such new bonds were exchanged for the old ones,

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one would only be a substitute for the other and be an extinguishment thereof, and the aggregate outstanding indebtedness would not be increased. Neither if the new bonds were sold for cash and the old bonds paid therewith would the indebtedness be increased. The presumption is that public officers will perform their duties honestly, and upon this presumption the injunction in that cause was refused. But if the proceeds of the sale of the new bonds were misapplied by the officers and the old bonds not paid, the indebtedness would be increased.

It was not held in *Powell v. City of Madison, supra*, that the new bonds would be valid under such circumstances. It was held by the Supreme Court of the United States, in *Doon Tp. v. Cummins, supra*, under the provisions of the constitution of Iowa, that when the bonds had been sold to pay off other bonds which were equal to the constitutional limit, and the money received for the new bonds was misapplied and the old bonds not paid, that the new bonds were invalid and not collectible.

To the same effect is *Anderson v. The Orient Fire Ins. Co., supra*. This question, however, is not involved in this case, and it is not necessary to determine whether or not the same rule prevails in this State.

It is the duty of persons dealing with public officers to take notice of their official and fiduciary character, and that they can only bind the public corporation they represent in the manner and to the extent authorized by law. *Bloomington School Tp. v. The National School Furnishing Co.*, 107 Ind. 43, and cases cited; *Julian v. State*, 122 Ind. 68; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464.

Appellee was required to take notice of the fact that appellant was indebted beyond the constitutional

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limit, and that the city therefore had no power to become indebted.

Appellant had no power, under the facts stated in the special finding, to become indebted to appellee, and the common council had no power to ratify or validate the same by resolution or otherwise. *Doon Tp. v. Cummins, supra*; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Loan Assn. v. Topeka*, 20 Wall. (U. S.) 655; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121; *Kane v. Independent Dist.*, 82 Ia. 5, 47 N. W. 1076; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101.

The resolution of the common council, adopted June 22, 1891, was therefore ineffective and gave no validity to appellee's claim.

It follows that the court erred in its conclusions of law.

Judgment reversed, with instructions to the court below to restate its conclusions of law and render judgment in accordance with this opinion.

MULVANE v. RUDE, EXECUTOR, ET AL.

[No. 17,813. Filed December 28, 1896.]

WILLS.—Construction.—The purpose in construing a will is to ascertain and give effect to the intention of the testator so far as the same may not interfere with the established rules of law.

SAME.—Construction.—Common Law Rule.—Life Estate.—The common law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, which was abolished in England in 1837, is in force in this State.

SAME.—Construction.—Bequests.—Common Law Rule.—In bequests of personal property, words of inheritance were not required at common law, nor are they now, to give an absolute title.

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SAME.—Construction.—Disposition of Real and Personal Property in Same Words.—Whenever a will purports to dispose of real estate and personal property in the same words and in the same connection, and it is manifest that testator intended both to go together, the will must be so construed.

SAME.—Construction.—A Clear Devise Not Modified by Subsequent Indefinite Provisions.—A devise in fee clearly and distinctly made or necessarily implied cannot be cut down or modified by subsequent provisions not clearly and distinctly setting forth the testator's intention to limit such devise.

SAME.—Construction.—Absolute Devise.—Gift Over.—Repugnancy.—When real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given.

SAME.—Construction.—General Devise.—Limitation Over.—Repugnancy.—Exception to General Rule.—Life Estate.—Where an estate is given to a person generally or indefinitely with power of disposition, it carries a fee, and any limitation over is void for repugnancy, except where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition.

SAME.—Construction.—Absolute Devise.—A testator by the first and third items of his will gave to his wife certain real estate in fee and the absolute title to certain personal property. In a fifth item of the will he expressed full confidence in his said wife and suggested, "That whatever part of the legacies hereinbefore made to her, and shall not have been expended or otherwise disposed of by her, may, at her decease, be given by her to such of my legal heirs as in her judgment shall need and would make good use of the same." And providing that in the event the said wife should die intestate, the remaining undisposed of property should go to a certain daughter. *Held*, that the will gave to the widow an absolute title to all the property, and that the devise over was void.

From the Morgan Circuit Court. *Affirmed.*

J. C. Robinson, H. C. Shaw and Willis Hickam,
for appellant.

W. R. Harrison, J. S. Bays, Emerson Short and D. E. Beem, for appellee.

MONKS, J.—This action was brought by appellant to recover the possession of certain real estate and

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personal property and to quiet the title to the real property. A demurrer for want of facts was sustained to each paragraph of the complaint, and judgment was rendered upon demurrer in favor of appellees. The errors assigned call in question the action of the court in sustaining the demurrer to each paragraph of the complaint.

The question to be determined is, whether the will of Samuel Folsom gave to Sophia D. Folsom, his second wife, by whom he had no children, the absolute title to the real and personal property in question, or whether it gave to her only a life estate with a remainder over to appellant, who was the only child of the testator by a former marriage. The court below held that the widow, Sophia D. Folsom, by the terms of said will took the absolute title to the real estate and personal property in controversy.

The will, so far as essential to the determination of this case, is as follows:

“First. I give and bequeath to my beloved wife, Sophia D. Folsom, in lieu of her interest in my lands, all my real estate in said town of Worthington, known and designated on the plat of said town as lots 21, 22 and the south half of lot 23, with all the appurtenances thereto belonging, and all the household and kitchen furniture, pictures, ornaments, and all other personal property of every description whatever belonging to me at the time of my decease, except money on hand or on deposit, notes, bills, bonds, and judgments of which I may be possessed at said time.

“Second. I give and devise to my daughter, Emily J. Mulvane, and her heirs, the farm on which the said Emily now resides or controls, in Edgar county, in the State of Illinois, containing one hundred and fifteen acres, and also all my unsold town lots in the towns of

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Freedom and Spencer, in Owen county, in the State of Indiana.

“Third. After paying all my funeral expenses and all my just debts that may be against me, as well as all expenses of executing this my will, I give and bequeath to my said wife, Sophia D., and my said daughter, Emily J., all the money on deposit or on hand. All United States bonds, judgments, promissory notes or other evidence of indebtedness belonging to me, or in which I may have any interest at the time of my decease, the same to be equally divided between my said wife and daughter upon their agreement so to do, so soon after my decease as may be proper and convenient. But any or all of said claims may be left in the hands of my executor (hereinafter named) for collection and division, as above directed.

“Fourth. I do hereby nominate and appoint my wife, Sophia D. Folsom, and my friend, William C. Andrews executors of this my last will and testament. And do hereby direct that my said executor, Sophia D. Folsom, shall not be required to give bond and security for the exercise of the trust hereby conferred upon her.

“I do hereby empower my said executors, or either of them, to collect, or to transfer and assign any or all claims due or payable to me upon an agreement as specified in item third, of this my last will and testament.

“Fifth. I do hereby revoke and make void all wills by me at any time heretofore made.

“And now, having full confidence in the judgment of and integrity of my wife, and there being a strong probability that she may survive me for some years, and fearing that some of my heirs may be unworthy of any special bequest before the decease of my said wife, I have therefore made the terms of this will as

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hereinbefore written, and will add the following suggestions to my said wife: that whatever part of the legacies hereinbefore made to her and shall not have been expended or otherwise disposed of by her, may, at her decease, be given by her to such of my legal heirs as in her judgment shall need and would make good use of the same. But in case my said wife should die intestate, whatever part or amount of the real and personal property hereinbefore willed to her which shall remain unexpended or otherwise undisposed of by her at her decease, I do will and bequeath to my daughter, Emily J. Mulvane, and her heirs."

The purpose in construing a will is to ascertain and give effect to the intention of the testator so far as the same may not interfere with the established rules of law. *Fowler v. Duhme*, 143 Ind. 248; *Allen v. Craft*, 109 Ind. 476; *Ross v. Ross*, 135 Ind. 367.

The common law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, which was abolished in England in 1837, is in force in this State, although it was abolished by the Revised Statutes of 1843, p. 485, section 5, until 1853. *Cleveland v. Spilman*, 25 Ind. 95; *Smith v. Meiser*, 51 Ind. 419; *Roy v. Rowe*, 90 Ind. 54; *Mills v. Franklin*, 128 Ind. 444; *Ross v. Ross*, *supra*.

In speaking of this rule it was said by Chancellor Kent, 4 Kent Com. (13 ed.), 535, *et seq.*, that, "It does not require the word 'heirs' to convey a fee; but other words denoting an intention to pass the whole interest of the testator, as a devise of *all my estate, all my interest, all my property, my whole remainder, all I am worth or own, all my right, all my title, or all I shall be possessed of*, and many other expressions of like import will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. * * * * It is also pro-

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vided by section 2737, Burns' R. S. 1894 (2567, R. S. 1881), that: "Every devise, in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all of the estate in such property, including estates for the life of another, which he was entitled to devise at his death." In bequests of personal property, words of inheritance were not required at common law, nor are they now to give an absolute title. *Chinn v. Respass*, 1 Monroe, T. B. 25; *Bailey v. Duncan's Representatives*, 4 Monroe, T. B. 256; *Boyd v. Strahan*, 36 Ill. 355.

Whenever a will purports to dispose of real estate and personal property in the same words and in the same connection, and it is manifest that the testator intended both to go together, it is held that the will must be so construed. *Heilman v. Heilman*, 129 Ind. 59, and authorities cited; *Ross v. Ross*, *supra*, p. 370; *Duncan v. Wallace*, 114 Ind. 169, 175; *Wyatt v. Sadler's Heirs*, 1 Munf. 537; *Johnson v. Johnson*, 1 Munf. 549; 3 Jarman on Wills (Randolph & Talcott's ed.), 36, note.

Under these rules counsel for appellant admit that the first item considered alone without regarding the fifth item, gave to the widow the real estate in fee-simple and the absolute title to the personal property, but they insist that when considered in connection with the fifth item and the surrounding circumstances, the title to the same was only during her life. It is thoroughly settled that a devise in fee clearly and distinctly made, or necessarily implied, cannot be cut down or modified by subsequent provisions not clearly and distinctly manifesting the testator's intention to limit such devise. *Mitchell v. Mitchell*, 143 Ind. 113; *Gingrich v. Gingrich*, *ante*, 227; *Orth v. Orth*, 145 Ind. 184; *Fowler v. Duhme*, *supra*; *Ross v. Ross*, *su-*

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pra; *O'Boyle v. Thomas*, 116 Ind. 243; *Bailey v. Sanger*, 108 Ind. 264; *Hochstedler v. Hochstedler*, 108 Ind. 506; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Moore v. Sanders*, 15 S. C. 440, 40 Am. Rep. 703; *Sherburne v. Sischo*, 143 Mass. 439, 9 N. E. 797.

When real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. *Wiley v. Gregory*, 135 Ind. 647; *South v. South*, 91 Ind. 221, 46 Am. Rep. 591; *Jackson v. Robins*, 16 John. 537, 588, and cases cited; *Helmer v. Shoemaker*, 22 Wend. 137; *Campbell v. Beaumont*, 91 N. Y. 464; *Ide v. Ide*, 5 Mass. 500; *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 312; *Bacon v. Woodward*, 12 Gray 376; *Bowen v. Dean*, 110 Mass. 438; *Gifford v. Choate*, 100 Mass. 343; *Kelley v. Meins*, 135 Mass. 231, 234; *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286; *Combs v. Combs*, 67 Md. 11, 8 Atl. 757; *Stowell v. Hastings*, 59 Vt. 494, 59 Am. Rep. 748, 8 Atl. 738; *Chaplin v. Doty*, 60 Vt. 712, 15 Atl. 362; *Exrs. of Judevine, v. Judevine*, 61 Vt. 587, 7 L. R. A. 517, and note, 18 Atl. 778; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112, and notes 115-119; *Bean v. Kenmuir*, 86 Mo. 666; *Norris v. Hensley*, 27 Cal. 439; *Smith v. Starr*, 3 Wharton 61, 31 Am. Dec. 498, and note pp. 501, 502; *Jaureche v. Proctor*, 48 Pa. St. 466; *Seibert v. Wise*, 70 Pa. St. 147; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269; *Hall v. Palmer*, 87 Va. 354, 11 L. R. A. 610, and note, 12 S. E. 618; *Rona v. Meier*, 47 Ia. 607, 29 Am. Rep.

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493; *Bills v. Bills*, 80 Ia. 269, and cases cited, 20 Am. St. 418, and note, 8 L. R. A. 696; *Ramsdell v. Ramsdell*, 21 Me. 288; *Mitchell v. Morse*, 77 Me. 423; 52 Am. Rep. 781; *Larsen v. Johnson*, 78 Wis. 300, 23 Am. St. 404, and note p. 409–410, 47 N. W. 615; *Howard v. Carusi*, 109 U. S. 725; 4 Kent Comm. (13 ed.), 535, 536.

The only exception to this rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. *Wiley v. Gregory*, *supra*, p. 652; *Wood v. Robertson*, 113 Ind. 323; *Downie v. Buennagel*, 94 Ind. 228; *South v. South*, *supra*; *Jackson v. Robins*, *supra*, and cases cited; *Idc v. Idc*, *supra*; *Rubey v. Barnett*, *supra*; *Appeal of Hinkle*, 116 Pa. St. 490, 9 Atl. 938; *Burleigh v. Clough*, 52 N. H. 267; *Logue v. Bateman*, 43 N. J. Eq. 434, 11 Atl. 259; *McCullough's Admr.*, v. *Anderson*, 90 Ky. 126, 7 L. R. A. 836, and note; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311, and note; note to *Larsen v. Johnson*, 23 Am. St. 410; 4 Kent Comm. (13 ed.), 535, 536.

Considering the fifth item of said will, in connection with the first and third, it is clear, we think, that Sophia D. Folsom had the power, during her life, to dispose of any or all the property, real and personal, given to her by said will. The suggestion of the testator in item five is not that his wife may at her decease give all the property received by her under the will to his heirs, but that she may give that part that shall not have been expended or otherwise disposed of by her. And the testator provides in said item that if his wife should die intestate, not that he gave and bequeathed all the property devised to her in said will

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to his daughter, Emily J. Mulvane, and her heirs, but only what shall remain unexpended or otherwise undisposed of.

Here is a clear recognition by the testator of her power to dispose of the real and personal property given her by said will. The power of disposition need not be given in express words, even where only a life estate is given by express words, but may be implied. *Silvers v. Canary*, 109 Ind. 267; *Clark v. Middlesworth*, 82 Ind. 240, and cases cited; *Ramsdell v. Ramsdell*, *supra*; *Scott v. Perkins*, 28 Me. 22, 48 Am. Dec. 470; *Shaw v. Hussey*, 41 Me. 495; *Paine v. Barnes*, 100 Mass. 470; *Harris v. Knapp*, 21 Pick. 412; *Ide v. Ide*, *supra*; *Kelley v. Meins*, *supra*; *Burbank v. Whitney*, *supra*.

In *Ide v. Ide*, *supra*, the court held that if the limitation over is not of the estate granted to the first devisee, but over of that which remains, it would seem clear there was an unqualified power of disposition implied in the first taker.

In *Shaw v. Hussey*, *supra*, the devise over was "all my real estate that may remain unexpended by her," the first devisee; the court held that the first devisee held by clear implication the right of disposal of the real estate.

If the first and third items considered alone are sufficient, as conceded by counsel, to give to the widow an estate of inheritance to the property, real and personal, mentioned therein, the unlimited power of disposition given in the fifth item, by implication, most certainly does not cut down the estate given by said first and third items; on the contrary, where such power is annexed to an estate given to a person even generally or indefinitely, it is held to carry a fee.

The correct test of the effect of provisions apparently at variance with other parts of the will, is whether the intent is to give a smaller estate than the

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words making the gift standing alone would import, or only to impose restraints upon the estate given. The former is lawful and effective because the testator's intention is the controlling consideration in the construction of the will; the latter is rarely if ever effective, for the reason that even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of any of its essential legal attributes. Did the devise over to the appellant reduce the fee previously given to a life estate? Such an effect may be produced if the language is so clear and definite as that it unequivocally appears that the testator meant to reduce the estate granted. This, under the settled rules of law, can only be done where there is a power of disposition, by giving in certain and express terms an estate for life only. *Jackson v. Robins, supra*, and cases cited, *supra*.

If the first and third items of the will gave the widow an absolute title to the property named therein, it is clear, from the authorities cited, that the devise over to the appellant was void.

It is not material, however, whether said items, construed alone, gave her an absolute title or not, as it is evident that said will did not in certain and express terms give her an estate for life only, but did, by implication, give her the power during her life to dispose of the same.

It follows, therefore, from what we have said and the authorities cited, that Sophia D. Folsom took an absolute title to the property in controversy, and that the devise over to the appellant was void.

Judgment affirmed.

ROBERTSON v. THE CHICAGO & ERIE RAILROAD CO.

[No. 17,869. Filed December 24, 1896.]

MASTER AND SERVANT.—Vice Principal and Fellow Servant.—How Distinguished.—The controlling inquiry as to whether one is a fellow servant or vice principal, must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant.

SAME—Negligence.—Fellow Servant.—Complaint.—In an action for personal injuries, plaintiff alleged that he was a helper in defendant's shops; that G., a machinist, under whose direction he was working, and who had power to discharge those working under him, directed plaintiff in a violent manner and with profane language to lift one end of a certain steam chest cover, said machinist and foreman promising to aid plaintiff; plaintiff being excited and fearing that he would lose his employment, and in reliance upon the promised assistance of said foreman, did lift said chest cover; that said foreman did not lend him any aid, and as a result of said lifting he was severely strained and suffered a rupture; that appellant well knew that the lifting was dangerous, which fact was not known to plaintiff; and defendant knew when it employed said foreman that he was quick tempered and passionata. *Held*, that complaint showed that the negligence, if any, was that of a fellow servant, and was not sufficient to withstand a demurrer.

From the Huntington Circuit Court. *Affirmed*.

H. B. Saylor, S. M. Saylor and J. M. Saylor, for appellant.

W. O. Johnson, J. B. Kenner and U. S. Lesh, for appellee.

HACKNEY, J.—The sufficiency of the appellant's amended complaint is the only question presented by the record. It alleged that he was an employe of the appellee in its machine repair shops, in the city of Huntington, working as a machinist's helper under one Grover, a machinist in appellee's employ; that he was subject to the directions of Grover and was liable

146	486
151	308
152	688

146	486
159	86
159	608

146	486
161	695

146	486
164	516
164	521

146	486
170	376

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to dismissal from the service if not obedient to him; that Grover "was a very quick tempered and passionate man, which the defendant at the time it employed him in authority over the plaintiff could have known and did know, but, notwithstanding such knowledge and disregarding the health and safety of its employes, and particularly this plaintiff," employed Grover and put him in authority over the appellee; that it became necessary to place the heavy cover of a steam chest in position upon a locomotive, and for that purpose appellant was directed to lift one end while two others should lift the other end, and while said Grover would stand upon the guards of the locomotive to receive the cover when lifted up to him. The appellant objected to the lifting against two men, when Grover said that he would stoop down and aid in the lifting, "and with violent and profane language and with violent manner ordered the plaintiff to lift said steam chest cover; said violent manner and said violent and profane language of the said Grover produced in the mind of the plaintiff great excitement and concern that he was in danger of losing his said employment," and, by reason thereof and in reliance upon the promised assistance from Grover, he did lift said cover and said Grover did not lend him any assistance; that as the result of said lifting he was severely strained and suffered a rupture. It is alleged also that Grover knew that such lifting was dangerous and that the appellant did not know that it would injure him, and, the pleading concludes, after an allegation, that the appellee, with knowledge of appellant's injury, discharged him and refused to give him employment; that the occurrence was without appellant's fault or negligence, and "was caused by the negligence and fault of the defendant, as herein set out."

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The two inquiries which must control the question presented by the complaint in review are these: Was Grover a vice principal, or, if not, was the appellee negligent in employing or retaining him in its service?

The learned counsel for the appellant stoutly maintain that Grover was a vice principal. The rule in this State, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant. *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398; *Spencer v. Ohio, etc., R. W. Co.*, 130 Ind. 181; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *Indiana, etc., R. R. Co. v. Dailey*, 110 Ind. 75; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Brazil, etc., Co. v. Cain*, 98 Ind. 282.

What duty of the master is shown by this complaint to have been neglected? One argument of counsel is that the appellee was obliged to supply a safe working place and safe machinery and appliances. True, but that duty was not alleged to have been omitted. "Safe working place and safe machinery and appliances" do not mean that heavy steam chest covers may not be put in place because the doing of it involves hazard from the mere weight required to be lifted. The act alleged to have directly resulted in injury was that of requiring the appellant to lift beyond his strength, and that act is alleged to have been one of the servant Grover. The act did not involve the supplying of a place to work or the instrumentalities of the service, but consisted in the manner in which

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several servants employed a proper instrument of the service. Unmistakably the appellant and Grover were fellow servants, and there was no liability of the appellee without some negligence on its part, not consisting alone in the act of Grover.

It is more than doubtful if any negligence is attempted to be alleged against the appellee, since the only charge of negligence is that with which the complaint concludes. If, however, that should be held to characterize as negligent every connection of the appellee with the occurrence as alleged, we should have the single inquiry as to whether a master employing a servant who is a "quick tempered and passionate man," is liable in damages for the remote consequences of that servant's evil use of his tongue. Counsel for appellant do not seek to affirm any such liability, and such is not the theory of the pleading. Nor do the allegations suggest that Grover was an unskilled or habitually negligent servant, nor that the company had any reason to believe that he was not fully acquainted with and competent to perform all of the duties of his employment. The failure of Grover to lend a helping hand as he had promised was not chargeable as negligence against the appellee, but was an omission by a fellow servant of the appellant. The allegations as to the fear in which Grover placed the appellant, by his angry and profane language, even if that condition of mind excused the appellant from doing that which he knew to be dangerous and that which he had refused to do because of his own judgment that his strength was not equal to it, are a doubtful answer to the requirement of non-contributory negligence on his part. But if they were a complete answer, the fact would yet remain that the whole occurrence was due to the negligence of a fellow servant in overestimating the physical strength of the

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appellant or in failing to assist him in bearing a burden. The fellow servant rule must be held to defeat the appellant's cause of action.

The judgment of the circuit court is affirmed.

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148	490
154	48

[No. 17,860. Filed January 5, 1897.]

DEDICATION.—Acceptance.—In order to constitute a complete and valid dedication of land to the public, it must be shown that the owner of the land clearly and unequivocally indicated by his words or acts to dedicate same, and there must also be an acceptance thereof by the public.

SAME.—Revocation.—The owner of lands dedicated to the public may at any time prior to the acceptance thereof by the public revoke such dedication.

SAME.—Town Plat.—Acceptance.—Revocation.—Where a town plat did not separate a small triangular lot at the intersection of two streets from the streets, and two years after the recording of such plat, a corrected plat was made and recorded which did reserve such strip of land, the making and recording of said first plat did not constitute a dedication of such strip of land to the public, where there was no evidence that the owner intended to dedicate same to the public and no evidence of an acceptance thereof by the public.

From the Perry Circuit Court. *Affirmed.*

Alexander Gilchrist and C. A. DeBruler, for appellant.

J. T. Patrick, C. L. Jewett, H. E. Jewett and Inglehart & Taylor, for appellee.

JORDAN, C. J.—Action by the appellant to enjoin the appellees' city of Tell City and the Louisville, Evansville, etc., Railroad Company, from erecting and maintaining a freight and passenger depot on a triangular strip of ground situated within said city,

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which strip, the appellant contends, is a part of a public street adjacent to his residence. Upon the issues joined between the parties there was a trial by the court and a special finding of facts, and upon the conclusions of law thereon, the court rendered its judgment in favor of appellees. The only errors assigned are those arising under the court's conclusions, based upon the special finding.

The theory upon which appellant's complaint proceeds is, that the strip of land upon which the depot of the railroad company is about to be erected, by virtue of a grant of right from the city, is a part of Seventh and Front streets, of the city of Tell City, and had been dedicated as a portion of these streets by the Swiss Colonization Society, which laid out and platted this city in 1859. Equitable relief by injunction was sought under the facts alleged in the complaint against the wrong and injury which the appellant alleged he would especially sustain as an owner of abutting property.

The facts material to a determination of the controversy involved are disclosed by the special finding as follows:

"First. In the year 1859 the Swiss Colonization Society was the owner in fee-simple of all the real estate upon which the defendant, the city of Tell City, is now situated, and in that year said Swiss Colonization Society laid out and founded Tell City, caused a map, or plat, of said real estate to be prepared by A. Pfaefflin, a surveyor, and caused the same to be recorded in the recorder's office of Perry county, on the 18th day of October, 1859, a copy of said plat, as so recorded, is attached to and made a part of the findings.

"Second. After making said plat on the 21st day of March, 1859, prior to recording the plat, said society,

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for a valuable consideration, conveyed lot one (1) in block C, as shown in said plat, to August Peters, by deed, specifying said lot as described in map of Tell City, surveyed and drawn by A. Pfaefflin; said deed was duly recorded in the recorder's office of Perry county, Indiana, on the 18th day of October, 1859.

"Third. On the 6th day of August, 1859, said society made a deed of lot No. two (2) in block C to Peter Pfaefflin, which was duly recorded in the recorder's office of Perry county, on the 15th day of August, 1859, before the plat of Tell City was recorded. On the 10th day of May, 1859, said society made a deed of lot three (3) in block C to Charles Steinauer, and the same was on the same day recorded in the recorder's office of Perry county; that on the 17th day of April, 1859, the said society conveyed lot two (2) of block fifty-one (51) to Louisa Heck, and on the 20th day of May, 1859, the said society conveyed lot three (3) of block fifty-one (51) to Susannah Snider, both of said deeds last named were duly recorded in the recorder's office of Perry county, within ten (10) days after their execution. That after the conveyances had been made by said society, which was before the plat of Tell City was recorded, and before the plaintiff had obtained title to any of the real estate hereinbefore mentioned, said society caused a corrected plat of Tell City to be made and acknowledged; said plat was duly recorded in the office of the recorder of deeds of Perry county, on the 28th day of January, 1861, and has never since been modified or changed. That in the acknowledgment and dedication of said last named plat, the following statements and reservations were made, namely: 'All lying between the blocks fronting the Ohio river and said river, and not enclosed by lines on the map are expressly reserved to said society;' that the triangular

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piece of ground in controversy in this action was a tract of ground, lying between a block fronting on the Ohio river and said river, and was one of the parcels of ground referred to in said statement and reservation. On the 5th day of May, 1862, the said August Peters conveyed said lot one (1) in block C to the plaintiff herein, by deed, which specified that the same lot which was conveyed by the Swiss Colonization Society to August Peters, conveyed all property with the privileges and appurtenances to the same belonging. On the 21st day of August, 1862, said Peter Pfaefflin conveyed by deed lot two (2) in block C to the plaintiff; that on the 21st day of June, 1862, the said Charles Steinauer conveyed by deed lot three (3) in block C to the plaintiff; that on the 12th day of May, 1862 (about sixteen months after recording the corrected plat), the said society conveyed to Steinauer and Wegman lot four (4) in block fifty-one (51), and that after the 12th day of May, 1862, and in or before the year 1865, by a certain mesne conveyance, the title of Louisa Heck to lot two (2), block fifty-one (51); the title of Susannah Snider to lot three (3), block fifty-one (51), and the title of Steinauer and Wegman in lot four (4) in block fifty-one (51), were conveyed to this plaintiff, that each and all of the deeds hereinbefore found to have been executed to plaintiff in referring to the real estate conveyed in such deed, referred to the plat of Tell City, and that each of said deeds was duly recorded in the recorder's office of Perry county within ten (10) days after its execution; that soon after the plaintiff received the deeds for lot one (1), two (2) and three (3), in block C, he took possession of the same, and within a year thereafter he erected upon said lots one (1) and two (2) a two-story brick residence, at an expense of several thousand dollars, for a family residence, and plaintiff with his family

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has ever since lived in said house; said house was built with its principal front on Seventh street, and with another front upon the triangular space, at the intersection of Front and Seventh streets, which last named front had two doors and three windows in the lower story, and four windows in the upper story; said residence was surrounded by a fence, this fence was built along the line of plaintiff's lot on Seventh street and along the line of plaintiff's lot on Front street; instead of building the same on the line of lot one (1) and said triangular space of ground, said plaintiff built said fence twelve (12) feet east of the line of lot one (1), so that during all this time he has inclosed by his said fence part of said triangular piece of ground the entire width of the same north and south and about twelve (12) feet in length east and west. Plaintiff built this fence at this point upon the statement of the city engineer that it was the line of plaintiff's lot; there was no opening or gate in the fence in front of plaintiff's house, where the same fronts upon the triangular piece of ground aforesaid, nor has there ever been any entrance to, or exit from said house through said fence, into said triangular piece of ground.

"Fourth. That in the year 1865, and soon after receiving the conveyances of lots two (2), three (3) and four (4) of block fifty-one (51), the plaintiff erected a large flouring custom mill, upon said lots, and has maintained the same in the same place ever since, and said mill has during all said time been operated by the plaintiff and is now operated by him in grinding for customers, and doing other work at said mill, and said mill has obtained a large custom and business from farmers and others in the neighborhood of Tell City.

"Fifth. At all times since the making of the said plat, the triangular space at the intersection of said

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Seventh and Front streets has been kept open, and no structures of any kind have been placed upon it, except that public scales have been maintained upon it by the plaintiff, with consent of the city of Tell City, for the general use of the people of Tell City and of the surrounding country, the plaintiffs paying an agreed consideration to Tell City for the privilege of having said scales in said place. Said scales are on the level of the surrounding soil, and is no obstruction to the passage and is the ordinary kind placed in streets or other open places. Seventh street in said city has been improved by graveling; Front street has not been improved, and the triangular space at their intersection has not been improved and has not been much traveled on, but at all times has been open for persons to pass and repass. No sidewalks have been made around said triangular space. The defendant railway company, with the permission of the plaintiff, and of the city of Tell City, a number of years ago, laid its track on Front street opposite plaintiff's lot and opposite the triangular space aforesaid, and has operated its railway ever since over said track."

The sixth finding may be summarized as follows: That prior to the beginning of this action, Tell City agreed to convey to its co-appellee, the railroad company, the strip of ground in dispute, upon the agreement of the latter to erect and maintain thereon a passenger and freight depot. The appellees threaten to carry out their respective agreements, and will do so unless restrained by the court. That the station or depot to be erected and maintained by the railway company is to be separated by a space of thirty-seven feet, from the fence on the east side of plaintiff's lot, and a distance of forty-nine feet from the rear line of plaintiff's lot one, in block C, and said depot building will cover said triangular strip. A driveway is to

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be left between said depot and the fence south of plaintiff's house, on the east side of the strip. On the side next to Seventh street the company intends to construct a switch track. That the company has neither tendered nor offered to pay any damages to plaintiff, and declares that it does not intend to do so.

The further finding is that the necessary effect of trains stopping or standing at the station will be to cut off access to plaintiff's real estate, in block C, from said strip of ground, and also to interfere with access to his real estate in block fifty-one on the east side of Seventh street. That the said structure and track, and the use of the same by the railroad company, will not interfere with access to plaintiff's real estate in block C from Seventh street, nor will the same interfere with access to his real estate from Front street, other than the same is now interfered with by the track laid, with the permission of the plaintiff; neither will said depot or the laying of said switch in any way obstruct the street in front of his property in block fifty-one (51) up to the middle line of said street. On September 2, 1878, said Swiss Colonization Society, by deed, conveyed all fractions and fractional blocks fronting on the Ohio river, as shown on the map of Tell City, to the city of Tell City, for uses and purposes set forth in said deed.

The trial court, upon the facts found, stated its conclusions of law in favor of appellees and rendered its judgment accordingly.

As stated, the appellant asserts that the strip in dispute is a part of the public streets upon which his premises abut, and that the same is a street within the city, by virtue of its being dedicated by the Swiss Colonization Society, under its plat, recorded October 18, 1859. This disputed fact seems to be the basis upon which he rests his right. Counsel for appellee

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controvert this contention and insist that the facts found do not support it. They further contend that if the facts can be held to sustain appellant's theory, that it was the intention of the original owner and founder of Tell City, namely, the Swiss society, to dedicate this strip of ground to the public for use as a street, it does not appear that there was an acceptance thereof, either on the part of the public or public authorities. It is also insisted that if it can be said that a dedication was intended by the plat first recorded, such dedication was revoked before any acceptance took place, by the corrected plat, recorded in January, 1861. The questions, therefore, presented for determination are: (1) Was there a dedication and acceptance of this strip, as contended by appellant? (2) If there was an intention to dedicate the strip to the public, as a street, under the original plat of 1859, was it revoked by the owner before its acceptance, by the corrected plat, made and recorded in 1861?

In order to make a dedication of a highway or a street complete on the part of the public, as well as the owner of the ground, it must be shown that there was an acceptance of such dedication by the public or proper local authorities. Elliott on Roads and Streets, p. 113; *Mansur v. Haughey*, 60 Ind. 364; *Ross v. Thompson*, 78 Ind. 90; *Tucker v. Conrad*, 103 Ind. 349; *San Francisco v. Canavan*, 42 Cal. 541; *People v. Underhill*, 144 N. Y. 316.

The holding of the above authorities, together with a long line of other decisions, well establish the rule that to constitute a valid and complete dedication, two things must occur, to-wit: an intention by the owner of the land, clearly and unequivocally indicated by his words or acts, to dedicate, and also an accept-

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ance of the dedication by the public. *Vide* Elliott on Roads and Streets, p. 120. Before there is an acceptance by the public, as a rule, the authorities hold that the owner may at any time revoke his dedication. Elliott on Roads and Streets, p. 113, and cases cited under note 1.

As disclosed by the finding, the Swiss society was the owner of the lands upon which the city is situated. In 1859 it made a plat of the town, which was not recorded until October, of that year. All of the lots in question of which the appellant is the owner, were sold to the persons through whom he claims title, in 1859, prior to the recording of the first plat. This plat, for some reason, seems to have been incorrect, and a corrected one was made by the society and recorded January 28, 1861. By this latter plat, it appears from the finding, that the strip of ground in controversy was reserved by the society. After the recording of this plat, appellant, in 1862, and subsequent to that year, acquired title to the lots mentioned in block C and block fifty-one. This triangular strip, it appears, lies between lot one, owned by appellant, in block C, and the point where the line of Seventh street and the east line of Front street meet. It is not within the boundaries of either of these streets, and from its situation, as shown by the map, it does not appear to be of any use to these respective streets, or to afford any reasonable or necessary use to the public as a way. While it is true that the plat in question did not separate it from the streets by lines, nevertheless we think the reason for this is apparent. The lots owned by appellant and composing the fractional block C ran from Seventh to Front street, and were marked and bounded so long as there was sufficient depth to constitute a lot; and this little triangular fragment of land, it would seem, was left over, for

that reason, without specifically indicating the purpose it was to serve.

Under all the circumstances, we do not think this is sufficient to reasonably raise the presumption that the society intended to dedicate it to the public. There is no express finding by the court showing that the society intended to dedicate this ground to any purpose. Evidentiary facts, tending to prove an intended dedication, or from which the same might possibly be presumed, are not of themselves such intended dedication. *Tucker v. Conrad, supra*; *Shellhouse v. The State*, 110 Ind. 509. If it could be said that there was an intended dedication by the Swiss society under its first plat, it does not appear that it was accepted by the public, or public authorities, before it was recalled, as the court finds, by the corrected plat.

If, under the facts, it could be held that the strip was in any way dedicated as a street, there is no finding of facts sufficient to prove that the public at any time accepted such dedication. This, as the authorities cited show, is essential.

This strip has not been in any way improved as a street. Neither has it been traveled nor used to any extent, as the finding discloses. There being an absence of user sufficient to constitute an acceptance, there must be proof of an acceptance on the part of the public authorities of Tell City by some formal act of theirs, showing an unmistakable intention to accept the land dedicated, and for the purposes for which it was intended by the dedicator to be used. *People v. Underhill, supra*. There seems to be virtually an entire absence of any such facts. Considering the acts of appellant, it does not appear that he himself recognized this ground as having been dedicated as a public street.

He appears to have enclosed part of it within his

The State v. Ray.

own premises. After the conveyance by the society, in 1878, to the city, he leased it from the latter, and located his scales thereon, paying a rental for this privilege.

Neither of the parties to this controversy, appellant nor the city, appear to have treated the strip now in dispute as a public street prior to the time the controversy arose. The acts of appellant in using it as a location for his scales, with the permission of the city, and paying a rent for this use, are of themselves to some extent inconsistent at least with his present contention that the strip was dedicated as and for a public street.

We think, under the facts, the court correctly held the law to be with appellee, and the judgment is therefore affirmed.

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[No. 17,712. Filed January 5, 1897.]

APPEAL AND ERROR.—*Assignment of Error.*—*Instructions to Jury.*—

Where an exception is made to the instructions given as an entirety, unless all of the instructions given were erroneous, an appeal thereon cannot be sustained.

From the Noble Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, *Merrill Moores*, *W. A. Glatte*, Prosecuting Attorney, *H. G. Zimmerman* and *H. C. Peterson*, for State.

Luke H. Wrigley, for appellee.

MONKS, J.—Appellee was prosecuted and acquitted of the crime of obtaining a bill of exchange by false pretenses.

The court gave to the jury thirty-four instructions

146	500
160	539
146	500
164	270

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at the request of appellee, to the giving of which appellant excepted. The exception was to the instructions given as an entirety, and not to each instruction separately. The giving of these instructions is assigned as error.

Under the well settled rule, unless all of said thirty-four instructions were erroneous this appeal cannot be sustained. *Lawrence v. Van Buskirk*, 140 Ind. 481, and cases cited.

It is not claimed by appellant that all of said instructions are erroneous, and objections are only urged against part of them. Some of said instructions correctly stated the law and, under the rule, we can not review the action of the trial court in giving the others, however erroneous they may be.

The appeal is therefore not sustained.

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[No. 17,808. Filed December 1, 1896. Rehearing denied Jan. 6, 1897.]

APPEAL AND ERROR.—*Parties.*—*Vacation Appeals.*—All parties affected by the judgment must be made co-appellants in this court, in a vacation appeal, or the appeal will be dismissed.

From the Huntington Circuit Court. *Appeal dismissed.*

J. M. Hatfield, for appellants.

B. M. Cobb, for appellees.

MONKS, J.—John Gibler brought this action against William H. Baker and appellants to foreclose a mortgage and recover judgment for the indebtedness secured thereby. All the appellants except Stults, administrator, were heirs at law of Martha Slusser,

146	501
153	314
146	501
154	394
146	501
167	551

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the sole maker of the notes secured by said mortgage, which was executed by her and her husband upon her separate real estate.

This appeal is governed by the provisions of the civil code, and not by the provisions of the act concerning the settlement of decedents' estates, being sections 2609-2612, Burns' R. S. 1894 (2454-2457, R. S. 1881).

As the record does not show that any appeal was prayed or appeal bond filed, as required by section 650, Burns' R. S. 1894 (638, R. S. 1881), this appeal, so far as appellants, other than Stults, administrator, are concerned, is not a term-time appeal.

It is provided, however, by section 657, Burns' R. S. 1894 (645, R. S. 1881), that "Executors, administrators, and guardians may have an appeal and stay of proceedings in the court below, without giving an appeal bond."

This section does not provide, however, that an executor, administrator or guardian can take a term-time appeal under the provisions of section 650 (638), *supra*, without filing an appeal bond and complying with the other provisions of said section. But conceding, without deciding, that an executor, administrator or guardian is entitled to take a term-time appeal under said section 650 (638), *supra*, without filing an appeal bond, it is clear that unless the appeal is prayed and a stay of proceedings is obtained in the court below, as provided in section 657 (645), *supra*, the appeal would be a vacation and not a term-time appeal. The record does not show that Stults, administrator, prayed an appeal or procured an order in the court below for a stay of proceedings; it follows, therefore, that the appeal is governed by law regulating vacation appeals, and not by the law regulating term-time appeals.

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It is settled law in this State that all parties affected by the judgment, must, in all appeals governed by the civil code, except those taken during term time under the provisions of section 638, R. S. 1881 (650, Burns' R. S. 1894), be made co-appellants in this court, or the appeal will be dismissed for want of jurisdiction. *Roach v. Baker*, 145 Ind. 330, and cases cited; *Shuman v. Collis*, 144 Ind. 333; *Lee v. Mozingo*, 143 Ind. 667, and cases cited p. 671; *Denke-Walter v. Loeper*, 142 Ind. 657, and cases cited.

William H. Baker was a co-party with appellants in the court below, and was affected by the judgment, and should therefore have been made a co-appellant to place the case within the jurisdiction of this court. *Lee v. Mozingo, supra*. This has not been done.

The appeal is therefore dismissed.

FAIRMOUNT UNION JOINT STOCK AGRICULTURAL ASSO-
CIATION v. DOWNEY.

146 503
1171 77

[No. 17,878. Filed January 6, 1896.]

NEGLIGENCE.—*Injury Received by Driver on Race Track.—Proximate Cause.*—An association conducting a horse race is guilty of negligence in starting a race of ten horses on a track thirty-seven feet wide at a time when another horse which had entered the race was being driven on the track in an opposite direction and was at a point within sixty feet of such starting place, and such negligence was the proximate cause of a collision between the horses and vehicles in such race, and the injuries resulting therefrom received by one of the drivers thereof.

EVIDENCE.—*Special Verdict.—Sufficiency Of.*—All of the allegations of a complaint are not required to be found in a special verdict, but it is sufficient if the facts found constitute a cause of action within the allegations of the complaint.

From the Madison Superior Court. *Affirmed.*

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St. John & Charles and Chipman, Keltner & Hendee, for appellant.

J. E. Moore, Freeman Cooper and Goodykoontz & Ballard, for appellee.

HACKNEY, J.—The appellee sought and recovered, in the lower court, a judgment for personal injuries sustained while engaged in a horse race upon the race track of the appellant and from the alleged negligence of the appellant. The complaint was in two paragraphs, the sufficiency of each of which is here presented.

Each paragraph alleged that the appellant had advertised for and invited participation in certain races for prizes, upon its race track during its fair season of 1894, under its control and direction; that the appellee had entered and his horse had been admitted, by the appellant, to participate in one of said races to be held on a day named; that said race had been called by the appellant and the various participants were upon the track; that the appellant carelessly and negligently started a number of the participants in said race without observing that one entitled to start was not with the number so started, but was going in the opposite direction from that in which the race was started and occupying a portion of the track over which the horses so started in said race were to pass; that the horses so started by the appellant and the horse so going in the opposite direction met within sixty feet of the starting point; that the appellee's horse was then traveling at a rapid pace, and when the driver of one of the horses so started, that he might avoid a collision with the horse going in the opposite direction, suddenly swayed his horse to one side of such other horse, but in doing so made it inevitable that the appellee's horse should collide with his horse

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and sulky; that the appellee's horse did collide with the horse and sulky so swayed from its course, causing the injuries complained of. It is alleged also that the appellee was without fault or negligence in said occurrence, and it was alleged that "by reason of dust and other obstructions, which he is not able to name or state, he did not see said horse and sulky going in the opposite direction, nor the turning or breaking" of the horse with which his horse so collided "until a few seconds before the collision occurred, nor until it was too late" and "was impossible to prevent a collision." In addition to these facts the first paragraph alleged that the appellant represented that said races would be conducted according to the rules of the National Association, which rules provided that all horses to participate in any race should be driven to the right of the starter's stand, turned and speeded rapidly in the opposite direction when started in a race, and that no horse should be allowed upon the track excepting those engaged in the race.

Each of the paragraphs is attacked by the appellant as disclosing (1) that the alleged collision was the result of contributory negligence; (2) that the appellant owed the appellee no duty on the occasion in question, and (3) that the injury was not the proximate result of the act of starting the horses in the manner alleged.

As we have seen, there is an express negative of contributory negligence, and this is not overcome by the allegation above quoted. That allegation, it is urged, discloses the same opportunity for the appellee to have seen the approaching horse as the appellant could have had to see it. If it was the duty of the appellant to use ordinary care for the safety of the appellee, that duty would require such assistants, suitably situated, as might reasonably guard the track

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from intrusion. No corresponding duty rested upon the appellee. It is a matter of common knowledge that the agricultural associations of the state, where they conduct horse races, have starting stands, so constructed as to enable those in charge to see the entire track and observe the conduct of drivers and horses. It is a matter also of common knowledge that the track and its use are subject to the control of the associations and the starting and stopping of the races are subject to their direction. Contestants have no corresponding opportunities or privileges. When one enters such contests, by the invitation and in obedience to the rules of the society, he assumes the ordinary risks thereof, but he does not thereby absolve the society from all duty or assume the hazards of every neglect of duty on its part. We cannot, therefore, agree with the insistence that the quoted allegation discloses equal opportunities on the part of the parties to know the danger which resulted in injury. That the duty rested upon the appellant to use ordinary care, considering all of the hazards of racing upon its track, to protect the appellee from extraordinary dangers was decided, in effect, in the case of *The North Manchester, etc., Assn. v. Wilcox*, 4 Ind. App. 141. It was there decided further that negligence in failing to keep the track clear, while horses are rightfully driven upon it, resulting in injury by collision, constitutes the proximate cause of such injury.

The mere starting of the horses, in this instance, did not produce the injury, but starting the horses at a high rate of speed in one direction while a horse and sulky were approaching from the opposite direction, and when both must meet within a few feet of the starting point, the society then knowing, actually or constructively, of the approach of the horse, was the natural and probable cause of the injury. It was an

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act from which the injury complained of might reasonably have been anticipated. Even if the particular result could not have been anticipated, our cases hold that the wrong which set in motion the cause of the injury was the responsible agency. See *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. 251, and cases cited in each. See also, as illustrating those causes which are proximate and those which are remote, *Enochs v. Pittsburgh, etc., R. W. Co.*, 145 Ind. 635.

It follows that the appellant owed a duty to the appellee which it neglected to perform, and that the appellee, in consequence thereof, was injured without his fault, and the paragraphs of complaint would both be good without the allegation as to the rules of the National Association.

The trial of the cause resulted in a special verdict by the jury in the form of answers to interrogatories, and upon this verdict judgment was rendered for the appellee over the motion of the appellant for judgment in its favor. This ruling is in question upon the assignment of error and briefs of counsel. It is urged that the verdict does not sustain, but departs from the theory of the complaint in that it is not found that the appellee could not see the horse approaching and meeting those started in the race by reason of dust and other obstructions preventing him from seeing. It is not found that there was dust to obstruct the view, but it is found that appellee could not and did not see the approaching horse. This is the equivalent of the appellee's allegation on the subject. It is the fact and not the evidence nor the reasons for his inability to see. There are other interrogatories and answers, however, which disclose that there were eleven horses and sulkies in the race, to be started

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upon a track thirty-seven feet wide; that they were started in tiers, two of four each and one of three; that the appellee was in the last tier; that the horses had scored once and failed to get started; that they had turned back and all but one had repeated the score and were started in the race, there being four horses and sulkies between the appellee and the returning horse, and the collision occurred within twenty-five feet from the starting point. These facts supply causes sufficient to prevent the appellee from seeing, and they are within the allegations of the complaint. All of the allegations of a complaint are not required to be found. It is enough when facts sufficient to constitute a cause of action, if within the allegations of the complaint, have been found. We may suggest the doubt, without intending to express an opinion upon it, if the allegation in question was not, at most, but an additional allegation of non-contributory negligence and not requiring affirmation by the appellee.

One interrogatory elicits the fact that the appellee, while scoring for the start, could not see the horse approaching in time to avoid the collision because his own horse commanded his entire attention. From this finding appellant's counsel skillfully evolve the argument that appellee's horse was unruly and occupied him when he should have been on the lookout for the approaching horse, and thus he contributed to the collision. Other findings show that appellee's horse was not unruly, and did not break or swerve from his proper place. Besides, it is not unnatural that a driver of one of ten horses and sulkies started together upon a thirty-seven foot track, should be fully occupied in avoiding collision with one of the ten, to say nothing of the importance of keeping his horse upon a steady gait and seeking proper oppor-

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tunities to pass to the front, without looking for the approach of a horse and sulky from the opposite direction. We do not, therefore, agree with the proposition that the special verdict is upon a theory different from that of the complaint.

Having assumed that the complaint disclosed contributory negligence counsel insist that the verdict should have shown that the injury was inflicted upon the appellee willfully, and that the judgment could not be sustained because of the absence of such finding. The theory of the complaint is, for negligence and not for a willful act. Upon the theory of negligence we have held it sufficient.

We find no error in the record, and the judgment is affirmed.

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[No. 17,935. Filed January 6, 1896.]

JUDGMENT.—*Failure of Clerk to Enter on Judgment Docket.*—The lien of a judgment on real estate is not lost by reason of the failure of the clerk to enter same on the judgment docket, although such real estate has passed into the hands of a *bona fide* purchaser without notice of such judgment.

SAME.—*Failure of Clerk to Enter on Judgment Docket.—Remedy of Purchaser of Real Estate.—Statute Construed.*—Section 594, Burns' R. S. 1894 (584, R. S. 1881), providing that, "Every clerk neglecting to enter any judgment or recognizance, as herein required, shall be liable to any person injured for the amount of damages sustained by such neglect," etc., gives to a *bona fide* purchaser of real estate, against which a judgment lien existed, but which the clerk failed and neglected to enter on the judgment docket, a right of action against such clerk for the amount of damages sustained by reason of such neglect.

From the Ripley Circuit Court. *Reversed.*

Adam Stockinger and *J. B. Rebuck*, for appellant.

M. R. Connelley, for appellee.

146	509
100	258

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MCCABE, J.—The appellee sued the appellant, Johnson, and Henry Bushing, sheriff of Ripley county, in a complaint of two paragraphs, seeking to enjoin the sale on execution of certain land on a judgment in favor of appellant, Hannah Johnson, and against one John W. Johnson.

The circuit court overruled a demurrer for want of sufficient facts to each paragraph of the complaint and sustained a like demurrer to the second paragraph of the separate answer of Hannah Johnson. A trial of the issues resulted in a finding and judgment in favor of the plaintiff and against the defendant, perpetually enjoining the sale of said land on said judgment and execution.

The errors assigned call in question the rulings above mentioned, and the action of the circuit court in overruling the defendant's motion for a new trial. The last error assigned is waived by the failure of appellants' counsel to discuss the same in their brief. The question of law involved arises on the facts stated in the complaint, as well as those stated in the answer.

It appears from the complaint that on August 8, 1887, one John W. Johnson and Clemency B. Johnson conveyed a certain town lot, particularly described in the town of Batesville, in Ripley county, Indiana, to James W. White, and on April 9, 1892, said James W. White and wife conveyed the same for a valuable consideration to the plaintiff, appellee, George F. Schloesser; that on September 13, 1886, in a cause pending in the Ripley Circuit Court for divorce, wherein said Hannah Johnson was plaintiff, and said John W. Johnson was defendant, said court rendered judgment, awarding her a divorce and for \$56.00 alimony, to be paid on September 14, 1886, and the further sum of \$50.00 each year during the natural life of Clemency B. Johnson; that said John W. John-

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son paid the \$56.00 as ordered on September 14, 1886, but that said payment was never entered on the order book, judgment docket, or elsewhere; that the only record or entry of said judgment ever placed in the judgment docket of said court by the clerk thereof, or by any other person, is as follows: "Judgment docket F, page 200. *Hannah Johnson v. John W. Johnson*, order book FF, page 462; judgment against the defendant for costs, date of rendition September 13, 1886."

That the fee docket of said court in which the fees and costs accrued in said action were entered, shows that said costs were duly paid by said plaintiff, and on the margin of said fee book, on the same page whereon is entered said fees and costs, the following entry is made, to-wit: "It was the agreement between the plaintiff and the defendant that the plaintiff is to pay this cost, and that when it is paid by her it is to be a satisfaction of this judgment as against the defendant. (Signed) Charles H. Willson, attorney for plaintiff."

That at the time plaintiff purchased said real estate he had no knowledge or notice of any kind that the defendant, Hannah Johnson had or claimed any judgment against said John W. Johnson, or any other person; that the fee book showed, at the time the abstract hereinafter mentioned was made, at the time plaintiff purchased said premises, that the costs aforesaid were paid, and showed the entry of satisfaction of said judgment, signed by Charles H. Willson, as aforesaid; that before purchasing said premises, to-wit: on March 23, 1892, plaintiff employed the recorder of Ripley county to make him an abstract of title for said real estate; that said abstract when so made did not mention, show or allude to any judgment against said John W. Johnson in favor of any person; that

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said recorder, on examining the judgment docket of said court, in preparing said abstract, found the only entry on record of said judgment to be as set forth above; that believing and relying on said abstract, and having no knowledge of the judgment mentioned, the plaintiff purchased said real estate, as aforesaid; that on the 15th day of June, 1894, said defendant, Hannah Johnson, caused an execution to issue out of the clerk's office of the Ripley Circuit Court on said judgment for the sum of \$406.00, with interest and costs, directed to the sheriff of said Ripley county, which came to the hands of the defendant sheriff of said Ripley county, and was by him, on August 24, 1894, levied on said real estate; that said defendants are threatening to sell said real estate by virtue of said execution and judgment, unless restrained, and thereby cast a cloud on plaintiff's title to said real estate. Prayer for a temporary restraining order and on the final hearing, a perpetual injunction.

Two reasons are urged by the appellant why the complaint is not good, namely: (1) That the lien of the judgment is not lost as against anybody by the failure of the clerk to enter it on the judgment docket; and (2) if it would be so lost as against a subsequent *bona fide* purchaser, that there was enough entered on the judgment docket in this case to put an ordinarily prudent man on inquiry which must lead to full knowledge of the judgment. If the question of law raised by the first reason urged should be decided in favor of appellant the second would be wholly unimportant. The appellee contends that while the judgment is a lien on all the real estate of the judgment defendant in the county as against him without being entered on the judgment docket, yet that it is not a lien as against subsequent good-faith purchasers for value of any of such real estate, unless such judgment is en-

tered on the judgment docket; and further, that the entry here was not such as to put him on inquiry.

Several sections of the code embraced in Article 24, title "judgment," exert a controlling influence in the proper determination of the question. Section 588, Burns' R. S. 1894 (R. S. 1881, 579), provides that: "The judgment must be entered in the order book, and specify clearly the relief granted or other determination of the action." Section 591, Burns' R. S. 1894 (R. S. 1881, 582), provides that: "The clerk of every court of record shall keep a docket, in which he shall enter, within thirty days after each term of the court, in alphabetical order, a statement of each judgment rendered at such term, containing—*First.* The names, at length, of all the parties. *Second.* The amount of the judgment and costs, and the date of its rendition. *Third.* If the judgment be against several persons, the statement shall be repeated under the names of each defendant, in alphabetical order." Section 593, Burns' R. S. 1894 (R. S. 1881, 584), provides that: "Such docket shall be a record, and open during the usual hours of transacting business to the examination of any person desiring it." Section 594, Burns' R. S. 1894 (R. S. 1881, 585), provides that: "Every clerk neglecting to enter any judgment or recognizance, as herein required, shall be liable to any person injured for the amount of damages sustained by such neglect, to be recovered in an action against the clerk alone, or upon his official bond against him and his sureties." Section 617, Burns' R. S. 1894 (R. S. 1881, 608), provides that: "All final judgments in the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, for the space of ten years after the

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rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record.”

It is conceded on both sides, and we think correctly, that in solving the question here involved, the several sections of the code quoted above must be construed together. But the appellant contends that they must be so construed as to hold that the action for damages against the clerk for failure to docket a judgment is intended to be given to the good-faith purchaser, and not to the holder and owner of the judgment; and, on the contrary, the appellee contends that such right of action was intended to be given to the judgment creditor, and not to the *bona fide* purchaser of the real estate for value.

Appellee’s learned counsel, in support of the latter position, say: “Now, we hold that while the judgment docket is not necessary to constitute the judgment lien, it is necessary to constitute sufficient notice thereof to third parties, and that a subsequent purchaser for a valuable consideration is only bound to look to the judgment docket for judgment liens, and * * * in the absence of actual notice he takes the land discharged from the lien, and the remedy of the judgment plaintiff, if there is no other property, is against the clerk, under section 585, R. S. 1881.”

In support of this contention appellee’s counsel cite *Berry v. Reed*, 73 Ind. 235. While the opinion in that case contains some remarks by the learned judge who delivered it, favorable to appellee’s contention, yet such remarks were clearly *obiter dictum*. The questions actually involved, and to a determination of which the opinion strictly confines the decision, do not support the appellee’s contention.

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The judgment lien there involved was sought to be created and established by the filing of a transcript of a judgment rendered in the common pleas court of another county than that in which the transcript was filed. It was there said that: "The plain intent of the lawmakers was that the filing and recording provided for in section 528 should be substantially contemporaneous acts, and where, by the next section, it was enacted that the judgment should be a lien from the time of filing, it was meant as against subsequent purchasers without actual notice, that a judgment filed, recorded and docketed as required in the previous section, should be a lien. * * * But deciding nothing as to the lien of judgments in the counties where rendered, and where in every case there is a record, in some form, which is accessible to every purchaser, and confining our decision to the case before us, we hold that the transcript of a judgment filed in another county, under the provisions of sections 528 and 529 of the code, *supra*, does not create a lien against subsequent purchasers in good faith, without notice, unless recorded and entered in the judgment docket." This decision proceeds upon the idea that the entry in the judgment docket is as essential to the creation of the lien as the recording of the transcript in the order book. The two acts are said to be intended by the lawmakers to be contemporaneous.

This case falls far short of supporting appellee's contention. It will be observed that the sections of the statute authorizing the creation of a lien in one county by filing a transcript of a judgment from another county and causing the same to be recorded and entered in the judgment docket do not provide where such transcript is to be recorded. Burns' R. S. 1894, sections 619, 620 (R. S. 1881, 610, 611). But they do provide where the judgment is to be entered. The

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practice is to record the transcript in the order book. The entry is required to be made in the judgment docket. The word docket is usually applied to the book or paper in which is entered a brief abstract of all proceedings in court. 5 Am. and Eng. Ency. of Law, 849. So that it would seem that there is much reason for holding that the entry in the judgment docket is as much a part of the essential requirement to make a transcript of a judgment from another county a lien as the act of recording the transcript thereof in the order book. But the case of a judgment rendered in the same county presents a different question, as the case cited clearly recognizes.

Appellee also cites and relies on *Bell v. Davis*, 75 Ind. 314. But that was the same kind of a case, involving the validity of the supposed lien of a judgment from another county by a transcript. Referring to *Berry v. Reed*, *supra*, the court in the former case says: "It is there expressly held, that, in order that the judgment shall constitute a lien, the clerk of the county to which the transcript is transmitted must enter and record it in the judgment docket of the county. * * * * * Judgment liens are created by statute, and the requirements of the statute giving a lien must be complied with, or none exists. In this case no lien attached until the transcript was filed, entered and docketed as the statute requires."

It will be observed that both of these cases hold that the filing and recording of a transcript of a judgment from another county by the clerk of the county to which it was transmitted creates no lien at all against anybody unless such judgment is also entered in the judgment docket of the latter court. It is not there held, as counsel suppose, that the lien only fails as to *bona fide* purchasers for value without actual

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notice, but exists as between the parties and as to those having notice.

Another case cited by appellee in support of his contention is, *State, ex rel., v. Record*, 80 Ind. 348. That was a suit brought against the clerk by the purchaser of the land involved in *Bell v. Davis, supra*, for failure to enter the judgment in the judgment docket. It was simply adjudged, in accordance with the two previous cases that the plaintiff could not recover because the clerk's failure to so enter such judgment did not injure the purchaser, by reason of the fact that no lien attached to the land he purchased by virtue of the recording of the transcript without also entering the judgment in the judgment docket. In other words, that he received a good title by virtue of his purchase. But it remains to be determined what is the effect of a failure to enter a judgment rendered in the same county in the judgment docket. That question has never yet been decided by this court.

The judgment in the county where rendered is required by section 588, *supra*, to be entered in the order book. Section 617, above cited, makes all such judgments liens upon the real estate of the judgment defendant in the county for the space of ten years after the rendition thereof. There is no exception or qualification to this provision, unless it be in the sections above quoted relative to entering the same in the judgment docket. It is very clear, from those sections, that the entry in the judgment docket is no part of the judgment, because it is not required to be entered until the thirty days next ensuing after the term of court at which the judgment is rendered. It is also apparent therefrom that such judgment docket is designed as a sort of index to, or convenient means of, ascertaining the judgments rendered against any

party in such county whether such party owns real estate in the county or not.

It was said in *Berry v. Reed, supra*, that: "Under these provisions, the purchaser of real estate, for thirty days after the close of a term of court, is bound to look to the order books for the judgments rendered at such term; and such may be the rule, even after the expiration of the thirty days." This statement of the law is undoubtedly correct. Because the statute makes the judgment a lien on the defendant's real estate in the county for ten years next after its rendition. And as the section providing for the entry thereof in the judgment docket allows thirty days after the term to make such entry, it necessarily follows that that provision does not take away the lien created by the other section, at least during such thirty days for failure to enter the judgment in the judgment docket. If, after the expiration of such thirty days the judgment is not entered in the judgment docket, and if the lien ceases on account thereof as against a *bona fide* purchaser or anybody else, the question arises, by virtue of what law, or what provision in the statute does it so cease? It is a well established rule of construction of statutes that the entire statute must be construed together, and that effect must be given to every part of a statute if it can be done without manifestly violating the intention of the legislature. *Cleveland, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 513; Potter's Dwarries on Statutes, 189.

It is contended by the appellee that the section giving the right of action against the clerk for failure to enter the judgment in the judgment docket is to be construed as giving such right to the judgment creditor. If that be correct, then it would necessarily follow that the intent was that the judgment creditor should lose the lien he had acquired by his diligence,

through the negligence of the clerk a month after the close of the term. But such a construction of the different sections necessarily renders a part of the statute of no effect. Section 617 makes the judgment a lien without qualification for ten years next after its rendition, against the world. The construction contended for renders so much of the section as makes it a lien against *bona fide* purchasers nugatory and meaningless; or rather qualifies the provision that it is a lien for ten years after its rendition. This violates a cardinal canon of construction, which affirms that: "The court is to give effect to every clause, section and word if effect can be given to it." Potter's Dwarrris on Statutes, 194.

The provision in section 594, making the clerk liable personally and upon his official bond to any person for the amount of damages sustained by his neglect to enter a judgment in the judgment docket, in no way points to the judgment creditor as the person who was to be clothed with the right of action therein provided for. Standing alone its language could as well be applied to a *bona fide* purchaser of the real estate sought to be subjected to the lien, as to the judgment creditor. To apply it to the latter is to refuse to give full effect to the section (617) creating and extending judgment liens for ten years. To apply it to the former gives full effect to every word and every clause of the whole statute and affords an ample remedy to any *bona fide* purchaser for all damages sustained by the clerk's failure to enter the judgment in the judgment docket. The well established rules of construction require us to so apply and construe the statute. The case of *Nichol v. Henry*, 89 Ind. 54, is very analogous, and in principle sustains the conclusion stated above. That was a suit to foreclose a mortgage against a subsequent purchaser for value, in

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good faith, without actual notice of the mortgage. It had been duly recorded in the mortgage record of the county wherein the land was situate, within forty-five days. But no entry was made by the recorder in the entry book in the recorder's office of such mortgage, and the same was not indexed in the general index of mortgages. The contention was that, by reason of the failure to so enter and index such mortgage it was not a lien as against such good-faith purchaser. After setting out the statutes providing for the keeping of an entry book and general index in which the recorder was required to enter such mortgage, it was there said: "These are the only acts bearing upon the question under consideration, and it seems to us manifest from the mere reading of them, that the entries required to be made in the 'entry book' and the general index do not constitute a part of the record of any instrument required to be recorded. The entry required to be made in the fifth column of the 'entry book,' to-wit: 'volume and page where recorded,' not only indicates that this entry is not the record nor a part of it, but shows very clearly that the instrument is recorded elsewhere. Nor does the general index constitute a part of the record. * * * * The language of the law is that the recorder shall keep up such index, as 'deeds and mortgages shall from time to time be recorded.' * * * *

"The purpose, as we think, of requiring entries in an 'entry book' and an index to be made, is to facilitate an examination of the records, and not to protect the interests of those whose conveyances are recorded; and in such case the failure of the officer to make the entries and to make the index, or either of them, will not prejudice the title of the grantee or mortgagee." To the same effect are the cases cited in that opinion, to-wit: *Bishop v. Schneider*, 46 Mo. 472, s. c. 2 Am.

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Rep. 533; *Chatham v. Bradford*, 50 Ga. 327. s. c. 15 Am. Rep. 692.

We therefore conclude that the circuit court erred in overruling the demurrer to each paragraph of the complaint.

The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

THE JEFFERSONVILLE WATER SUPPLY COMPANY
v. RITER ET AL.

[No. 18,008. Filed January 7, 1897.]

MECHANIC'S LIEN.—*Notice*.—A notice of intention to hold a mechanic's lien is not invalid for failure to specify when the work was done, or material furnished.

SAME.—*Notice*.—*Contents Of*.—Under the statute providing for a mechanic's lien, the notice thereof is sufficient when it states the amount due, to whom, from whom, and for what, and describes the premises; and such notice may be signed through the agency of an attorney.

PRACTICE.—*Harmless Error*.—Sustaining a demurrer to a paragraph of answer alleging facts which could have been proven, so far as the same were competent, under the general denial is harmless error.

SAME.—*Admission of Evidence Under General Denial*.—The defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint, but may introduce proof of facts, independent of those alleged in the complaint and inconsistent therewith.

From the Floyd Circuit Court. *Affirmed*.

A. Dowling, for appellant.

S. S. Johnson and Voigt & Stotsenburg, for appellees.

JORDAN, C. J.—Appellees brought this action to foreclose a mechanic's lien upon a claim due them for the erection of a standpipe. This is the second appeal

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154	548
155	524
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159	289
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160	253
160	279
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146	521
161	501
146	521
163	116
146	521
164	321
146	521
165	654
146	521
166	557
167	314
167	648
168	116

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to this court. See the *Jeffersonville Water Supply Co. v. Riter*, 138 Ind. 170. After the cause was remanded to the lower court by the order in the former appeal, appellees filed an amended complaint, and under the issues joined thereunder, a trial resulted in a finding that there was due to plaintiffs (now appellees) the sum of \$6,000.00 and over. Judgment foreclosing the lien in controversy was awarded in their favor. The evidence has not been certified to this court, and a reversal of the judgment is sought by the appellant upon alleged errors of the trial court upon its rulings on demurrers to the pleadings.

The amended complaint *inter alia* substantially alleges that Samuel R. Bullock, on April 6, 1888, was the owner in fee-simple of certain real estate, described in the complaint, situated in the town of Port Fulton, in Clarke county, Indiana, and that his deed for said realty was at, and prior to said date of record in the recorder's office of said county; that on said 6th day of April, he and plaintiffs entered into a written contract whereby they agreed to furnish material for and erect a standpipe on said real estate for the sum of \$7,900.00. Said pipe to be used in connection with the water works system then being built for the city of Jeffersonville. A copy of the contract is filed with the complaint. It further avers that on April 10, 1888, plaintiffs commenced the work of building and erecting the standpipe and furnishing material for the same, and on July 30, 1888, had it ready to be placed upon said real estate; and the building of said pipe thereon was completed on December 1, 1888, and on December 4, 1888, within sixty days after the material was furnished and the work thereon completed, the plaintiffs filed in the recorder's office of said county, a notice of their intention to hold a lien upon said property for the amount due upon their claim.

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A copy of this notice is filed with the complaint. That on April 21, 1888, said Bullock and his wife conveyed said real estate to the defendant, the Jeffersonville Water Supply Company, and that it is now the owner thereof, and is using and operating said standpipe; that plaintiffs had no knowledge of said conveyance by Bullock until after the completion of said work, and that said defendant withheld its said deed from record until August 20, 1888, being long after the plaintiffs had commenced the work of erecting the standpipe; that on the date last mentioned said company caused said deed to be recorded in the recorder's office of said county. Partial payments made by Bullock are averred, and judgment is demanded for a foreclosure of the lien.

After unsuccessfully demurring to this complaint, appellant filed its answer in six paragraphs. The first was a general denial. Second, payment. The third alleged that before the execution of the contract between Bullock and plaintiffs, as alleged in the complaint, it had contracted with said Bullock to construct a system of water works at the city of Jeffersonville, in Clarke county, Indiana, and as a part of said contract, Bullock was to furnish, at his own expense, land for the location of the standpipe, etc. That in pursuance of said contract Bullock purchased the real estate mentioned in the complaint, and thereafter caused to be erected thereon the standpipe mentioned; that he held said land in his own name, in trust, for said company; that on April 21, 1888, before plaintiffs had performed any labor or furnished any material for the standpipe, Bullock conveyed the legal title of said real estate to defendant. Open possession of the land by defendant is averred, and that plaintiffs thereby had notice that the company was the equitable owner of said real estate.

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The fourth paragraph is similar to the third, but proceeds more fully and specifically upon the theory that the company had let a contract to Bullock to construct the standpipe and to purchase and furnish the ground for its location, and that plaintiffs in furnishing the material and doing the work, as alleged in the complaint, were but sub-contractors, under Bullock, and that as such they had failed to notify the defendant that they were furnishing said material and doing said work as such contractors, and that they would look to it for payment.

The fifth and sixth paragraphs, as outlined by the facts, proceed also upon the theory that the company had let the contract to Bullock to furnish the ground and erect the standpipe, of which the plaintiffs had notice, and that the latter were only sub-contractors, and that they had failed and neglected to give notice to said company that they were furnishing the material and doing the work mentioned in the complaint as such contractors, etc. A demurrer was sustained to the third, fourth, fifth and sixth paragraphs of the answer.

The first insistence, upon the part of appellant, is that the complaint is not sufficient to withstand a demurrer. The amended complaint is substantially the same, except as improved by the amendment, as the one held to be sufficient upon the former appeal. Its sufficiency, therefore, must be deemed settled by that decision. It is further urged, however, that the notice which appellees filed of their intention to hold a lien is insufficient for two reasons: First. That it does not state that the work was performed and material furnished sixty days prior to filing the notice in the recorder's office. Second. That the names of the appellees appear to be signed to the notice by S. S. Johnson, their attorney. As to the first objection urged,

it may be said that the statute does not require the notice to state or specify when the work was done or material furnished, and such omission would not result in rendering the notice deficient.

The fact that the name or names of the persons desiring to acquire the mechanic's lien have been signed to the notice filed in the recorder's office, through the agency of their attorney, will not render such notice invalid and thereby defeat the lien. The statute does not, in express terms, require that the notice shall be signed by any one. The notice in dispute, however, gave the names of the appellees as the persons seeking to obtain the lien, and in this respect it disclosed to all concerned who were intending to hold a lien upon the property described. Under the statute providing for a mechanic's lien, the notice to be filed in the recorder's office is sufficient when it states the amount due, to whom, from whom, and for what, and describes the premises. *Coburn v. Stephens*, 137 Ind. 683. The notice in question complied with these requirements and was therefore sufficient.

The next contention of appellant's learned counsel is, that the court erred in sustaining appellee's demurrer to the third, fourth, fifth and sixth paragraphs of the answer. The complaint, as we have seen, under its alleged facts, proceeded upon the theory that Bullock was the owner in fee-simple at and prior to the time appellee contracted with him to furnish the material and build the standpipe thereon. That they built the pipe under the contract for him. That after they had commenced the work, he conveyed said land to appellant, but that appellees had no knowledge of said conveyance until after the completion of the work. Each of the paragraphs in controversy, by the facts outlined therein, proceed upon the theory that no such cause of action as the one alleged in the com-

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plaint ever existed. There is no attempt to confess the cause of action and avoid it by new matter. The facts alleged were evidently intended by appellant to negative those set up in the complaint, by showing that Bullock was not the owner in fee of the real estate at the time appellees contracted with him to build the standpipe, and that knowledge must be imputed to them of that fact, and that they were but sub-contractors, in furnishing the material and erecting the standpipe, and that they had failed to give to appellant the notice required by the statute to the effect that they were furnishing the material and performing the work as such sub-contractors. The facts averred in these paragraphs, so far as they might be competent as a defense, were admissible under the general denial which appellant had pleaded, and therefore it was not necessary to affirmatively plead them. A defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint, as a cause of action, but may, upon the trial, introduce proof of facts independent of those alleged in the complaint, but which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of action. Works' Practice, Vol. 1, section 579; Pomeroy's Rem., section 644; Bliss Code Pleading, section 321; Boone Code Pleading, section 65 (Pony Series); Code 1881, section 127; R. S. 1881, section 377; *Balue v. Scar*, 131 Ind. 301.

As the facts embraced in these several paragraphs so far as the same were competent, could have been proven under appellant's denial, hence sustaining the demurrer thereto, if erroneous, as urged, would be harmless, and no injury resulted to appellant from such ruling. *Claypool v. Jaqua, Admx.*, 135 Ind. 499.

No available error appearing, the judgment is affirmed.

Smith *et al.* v. Reister.

SMITH ET AL. v. REISTER.

[No. 18,078. Filed January 7, 1897.]

APPEAL.—Motion to Dismiss.—The ruling on a motion to dismiss, to be available on appeal, must be made part of the record by bill of exceptions or order of court.

From the Posey Circuit Court. *Affirmed.*

E. M. Spencer, for appellants.

William Reister, for appellee.

HOWARD, J.—The appellee made application at the March term, 1896, of the board of commissioners of Posey county for license to sell intoxicating liquors. The appellants filed a remonstrance against the granting of the license, and the license was refused. On appeal to the circuit court a motion to dismiss the remonstrance was sustained, and this ruling is the only error complained of. The motion to dismiss, however, is not made a part of the record by bill of exceptions or order of court, and cannot therefore be considered. *Crumley v. Hickman*, 92 Ind. 388; *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Beard, etc., v. Montgomery*, 109 Ind. 69.

Judgment affirmed.

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166	76

STATE, EX REL. MAXEY ET AL. v. SWINDELL, MAYOR.

[No. 17,986. Filed January 8, 1897.]

MUNICIPAL CORPORATION.—Rules for Government of Common Council.—Ordinances.—Repeal.—Rules for the government of a city council, presented in writing and adopted at a regular meeting of such council, are in effect an ordinance and cannot be repealed on a mere verbal and general motion to that effect.

From the Marshall Circuit Court. *Affirmed.*

State, ex rel. Maxey et al. v. Swindell, Mayor.

J. D. McLaren, E. C. Martindale, C. P. Drummond and Samuel Parker, for appellants.

Charles Kellison, for appellee.

MCCABE, J.—Appellant's relators, Maxey and O'Keefe, applied to the circuit court for a writ of mandate against the appellee as mayor of the city of Plymouth, Indiana, to compel him to recognize each of them as members of the city council of said city, and to permit them to exercise the duties of such councilmen, they alleging that they had been legally appointed and qualified as members of said council from the alleged fourth ward of said city, which ward they allege had been duly and lawfully created by a certain alleged ordinance enacted by the common council of said city, August 27, 1894.

Appellee resisted the action, basing his defense upon two propositions, namely:

1. That the common council was not authorized by law to adopt the ordinance by which said additional or fourth ward was created, of its own motion, as was done in this case, and without a previous petition being filed therefor by resident citizens of the ward or wards affected, and that the ordinance being invalid for this reason there was no fourth ward and no vacancies in the office of councilman to be filled when relators were appointed, and hence they were not members of the common council or entitled to be recognized as such.

2. That if the council had authority of law to enact the ordinance creating the additional or fourth ward without petition and of its own motion, that the ordinance was invalid and of no force or effect for the reason that it was passed and adopted contrary to and in violation of the rules of procedure that had long been in force in said council.

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The issues formed were tried by a jury, the trial court directing the jury to find for the plaintiff, which they did, and a peremptory writ of mandate was awarded against the mayor. From that judgment he appealed to this court and the judgment was reversed. *Swindell, Mayor, v. State, ex rel.*, 143 Ind. 153.

This court, on that appeal, decided the first proposition above mentioned in favor of the action of the common council and against the then appellant, the present appellee. And the second proposition or contention was decided in favor of the then appellant, the present appellee. The cause was reversed both for the error of striking out the second paragraph of the answer or return, setting up the defense involved in said second proposition, and for the error of holding, as appeared from the evidence, that the rule had been repealed in violation of which the ordinance establishing the fourth ward had been passed. In the order of reversal leave was given to amend the second paragraph of answer or return. On the return of the cause to the lower court said answer was amended only in immaterial respects.

The substance of the second paragraph of answer as amended is, that on August 27, 1894, the time of the regular meeting of the common council of the city of Plymouth, when said pretended ordinance was passed creating the fourth ward, and for a long time prior thereto, said common council was and has been governed by certain rules enacted by said common council, regulating and governing the deliberations and proceedings of the common council of said city, which rules were, on August 27, 1894, in full force and effect; section 21 of which reads as follows:

“All ordinances shall be read three times before being passed, and no ordinance shall pass or be read

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the third time in the same meeting it was introduced; provided, that the council may suspend this rule by a two-thirds vote and put an ordinance upon its passage, by once reading and at the time it is read."

That said rule 21 was adopted by the common council of said city on May 26, 1873, and was a rule to which said council had yielded obedience from the time it was adopted, as aforesaid, until August 27, 1894, when said council attempted to repeal it, as hereinafter set forth; that on said date, at the regular meeting of said council referred to, the ordinance providing for the creation of the pretended additional or fourth ward was introduced and passed by said council, composed of only six members, without suspending said rules, or either of them, by a two-thirds vote before the enactment of said ordinance, the same having been read and put upon its passage at said regular meeting; that but three members of said council voted for said ordinance and three against it, and there being a tie, the mayor, Charles P. Drummond, cast the deciding vote in favor of said ordinance, and he then and there declared said ordinance duly enacted. And that was all the action ever taken by said council and said mayor in the enactment of said ordinance. And that the only appointment of relators to the offices of councilmen which they claim to hold, was made under the ordinance creating said fourth ward, so enacted in violation of said rule to fill the vacancies supposed to exist by the creation of such new ward.

These facts were held, on the former appeal, to constitute a good return to the writ of mandate and a complete defense to the proceeding. The facts are more fully set forth in that opinion, and the authorities bearing upon the question thus presented are exhaustively reviewed therein.

On the filing of the above amended second para-

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graph, which is not materially different from the original, the relators sought to raise, as they claim, a new question by filing the reply, the sustaining a demurrer to which is assigned as the only error on this appeal.

The substance of the reply is, that the rules mentioned in defendant's answer were not in force or effect on the day of the passage of the said ordinance; that the common council never prescribed or adopted by ordinance any rules or regulations for the government of the official conduct of said common council, and that said section 21 of said rules was never adopted by the common council of said city by ordinance or resolution. That the rules, a copy of which are made a part of defendant's answer, were adopted by the common council of said city in the manner and at the time as follows, namely: At a special meeting of the common council, held May 19, 1873, on motion of Councilman Johnson, a committee of three was appointed by the mayor to report rules regulating the order of business to govern the council in the transaction of all business that may come before it, said committee consisting of Councilmen Johnson and Mayer, and by unanimous request of the council, the mayor consented to serve as the third member of the committee; that at a regular meeting of the common council of said city, held on May 26, 1873, the said committee so appointed the week before, reported to said council a list of rules regulating the order in which the council shall conduct their deliberations, which, after being read, were, on motion of Councilman Mayer, seconded by Brownlee, adopted by unanimous vote of the council. That said list of rules is the identical schedule or list of rules set up in the answer of the defendant, and that said rules were never adopted in any other or different manner. And as thus adopted they were recognized by the common

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council as in full force and obligatory upon it until August 27, 1894, when they were repealed by a majority vote of the common council of said city when in regular session, on a motion duly made and seconded by members of said common council, which repeal was effected before the passage of the ordinance creating said additional or fourth ward, and at the time of the passage of said ordinance there were no rules whatever in force regulating and governing the council in the transaction of its business.

It is contended by the appellee that the facts set forth in this reply do not present a materially different question than that presented on the former appeal by the answer and the evidence, and we are inclined to think that is so. At least, the relators are very late in presenting the question, if the reply does present a different question than that presented and decided against them on the former appeal. They ought to have presented their whole case then, if they did not, and have it decided in the one appeal.

The contention is, that these rules do not rise to the dignity of ordinances, and hence, in order to effect their repeal it is only necessary to produce an act of the corporation of equal grade or dignity with them. Webster defines an ordinance to be a rule established by authority. Dillon says, "under the general term of 'ordinances' have sometimes been included all the regulations by which a corporation is itself governed. * * * * * Indeed, in general and professional use, the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'by-law.'" Dillon's *Munic. Corp.*, Vol. 1, section 307. The reply concedes that these rules were duly enacted by the common council and had been in full force more than twenty years, and that they were in writing and had

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been recognized by the council as binding on it for over twenty years.

And the reply further concedes that their repeal was attempted to be effected in order to obviate the necessity of a two-thirds vote to suspend rule 21, and that the attempted repeal was by a mere verbal motion.

The precise question arising upon these facts was decided against appellants on the former appeal in the following language:

"The verbal motion made by this councilman as recorded by the clerk by which it was sought to effectually repeal the rules ordained for the government of the council was, to say the least, somewhat indefinite.

* * * If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question, could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number or date of passage of the ordinance or ordinances intended to be repealed, In the case of *Bills v. City of Goshen*, 117 Ind. 221, 3 L. R. A. 261, it was held by this court that a defect in an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council and put to a vote and carried."

It was adjudged that the attempted repeal of the rules was ineffectual, and that therefore the enactment of the ordinance creating the fourth ward to fill the supposed vacancy in which the relators were appointed was void because passed in violation of rule 21.

That decision is the law of the case, and it conse-

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quently follows that the reply in question did not state facts sufficient to avoid the answer.

Therefore, the circuit court did not err in sustaining the demurrer to said reply.

Judgment affirmed.

WORTHLEY v. BURBANKS ET AL.

[No. 17,183. Filed January 12, 1897.]

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150	700
151	345
151	348

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161	389

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163	545

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166	334

ADVERSE POSSESSION.—*Essential Elements Of.*—Ordinarily there are five indispensable elements in adverse possession: 1. It must be hostile and under a claim of right. 2. It must be actual. 3. It must be open and notorious. 4. It must be exclusive. 5. It must be continuous.

SAME.—*Possession of Part of Tract, Constructive Possession of Entire Tract.*—Possession under color of title of any part of a tract of land is held constructively to include the whole of such lands.

SAME.—*Exercise of Exclusive Dominion.*—Possession under color of title cannot be more than the exercise of exclusive dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it.

SAME.—*Unproductive Lands.—Actual Occupancy Not Necessary.*—Adverse possession of unproductive lands is shown by the recording of deed under which the occupant claims; payment of taxes; cutting of all the valuable timber; going upon the land at intervals, claiming absolute ownership; the employment of agents in the neighborhood to look after it, and the building of a brush fence around a portion cleared, without proof of actual occupancy.

From the Porter Circuit Court. *Reversed.*

E. D. Crumpacker and Collins & Collins, for appellant.

J. W. Youche, for appellees.

HACKNEY, J.—The appellant sued to quiet her title to an eighty acre tract of land in Lake county, and the appellee, Burbanks, by cross-complaint, sought to

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quiet the title thereto in himself. On change of venue from the Lake Circuit Court the cause was tried and a special verdict rendered in the Porter Circuit Court. The appellant and the appellee each moved for a judgment upon the special verdict, and the motion of the latter was sustained and that of the former was overruled. These rulings present the only question assigned as error in this court.

The facts found disclose that the appellee, in October, 1857, became the owner of the legal title to said lands; that his deed was properly recorded in January, 1858; that he never conveyed or transferred his said title; that he was not, and has not since been a resident of Lake county; that he did not see said lands excepting in the years 1858, 1880 and 1891, when during each of said first two years he visited said lands once and, in the last of said years, he built a small frame house thereon; that said lands were wild, uncultivated and unimproved and were never in his actual possession or occupancy prior to June, 1891; that for the years 1859 and 1860 said lands were subject to taxation in said county and were assessed in the name of said Burbanks, but said taxes, nor any taxes thereafter assessed were ever paid by him. For the years named said taxes became delinquent, and in January, 1861, said lands were sold therefor, by the treasurer of said county at public sale, and were purchased by one Dibble, who received a deed therefor in 1864, said lands never having been redeemed from said sale. Dibble sold to Arvida Worthley in March, 1868; Arvida Worthley conveyed to one Rose in January, 1873, and Rose, on the same day, conveyed to the appellant. The deeds of said several conveyances were duly entered for record in Lake county near the dates of their execution, and since June 16, 1869, said lands have been entered for taxation against said

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Arvida Worthley and this appellant. The taxes on said lands, from the year 1859 until 1892, were paid by said several grantees, Dibble, Worthley and the appellant, and, in the year 1890, she paid the sum of \$17.25, assessed in her name against said lands for a public ditch then constructed. Said lands are located about two miles from the village of Tolleston, and have ever been "barren sand ridges and hills, interspersed with a few sloughs; that said sand ridges contained no soil and were wholly unproductive and unfit for any kind of cultivation and wholly unfit to be used for farming or gardening purposes, or for any other useful purpose whatever; that the sloughs on said land produced nothing but a coarse kind of grass in small quantities, which was utterly worthless and unfit for any purpose and had no market value either in the vicinity of the land or anywhere else; that said land was * * and has been continuously * * * incapable of producing any kind of crop or yielding anything of value whatever." That when Dibble obtained his tax deed he went upon said land and cut off all timber of any value and removed the same, since which time said lands have been "covered in a large part by small brush and small scrub oak trees," of no value for any purpose; that said lands have never possessed any value, and have not been adapted to "resident purposes or platting or subdividing or to any other useful purpose."

"Said Arvida Worthley, in the summer of 1868, entered upon said land, claiming to own the same, and caused said land to be surveyed, and chopped and grubbed the brush out along the line thereof all the way around said tract, and caused stakes to be driven at the corners and some places along the line for the purpose of marking the line of said land, all of which remained visible to the common observer for four

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years; that in the year 1869 the said Arvida Worthley frequently visited said land and went upon the same and openly and notoriously claimed to be the owner thereof, and gave permission to a resident in the vicinity of said lands to cut a small quantity of coarse slough grass thereon; that in the year 1870, said Arvida Worthley visited and went upon said land frequently, still claiming the ownership thereof, and during said year, he grubbed and cleared about a half acre of said land and enclosed the same with a brush fence, but the soil upon said land was so barren and poor that he did not plant any crop thereon, but, during said year, he planted a small patch of cranberry vines in a marsh or slough on said land." In each of the years 1871 and 1872 he went upon said land several times and openly and notoriously claimed to own the same, and gathered small quantities of cranberries therefrom.

In January, 1873, when said land was conveyed to the appellant, and when she and her husband, said Arvida, moved to Michigan City, from Tolleston, where they had theretofore resided, she, this appellant, put William L. Worthley, her son, in charge of said lands and authorized him to look after and care for the same; that from said date, each year, until and including 1878, said son visited said lands three or four times, at each visit going upon and over said lands, claiming at all times, openly and notoriously, that the appellant owned said lands, and during the same period and at all times thereafter she claimed, openly and notoriously, to own said lands. That in 1878, when her said son moved to a western state, she employed one Gibson, a resident of Tolleston, and authorized him to look after and take care of said land for her, and from that time to the time of the trial he went upon said lands several times each year for the

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purpose of looking after the same, and at all times, during said period, he did openly and notoriously claim and declare that the appellant was the owner of said lands and that he, as her agent, was in charge thereof. That the said Arvida Worthley, from the time he purchased from Dibble until January, 1873, and this appellant, from January, 1873, to the time of the trial, continuously, openly and notoriously claimed to own said lands, and in like manner exercised all such acts of dominion, control, and ownership over the same as fully and completely as other owners of like lands exercised respecting the same, and that they did, severally, during said periods respectively, exercise such dominion, control and ownership over said lands as could be exercised in view of the condition, character and adaptability of said lands, all of which was open, notorious and visible, and to the exclusion of every other person. That Burbanks never inquired as to the ownership of said land from 1858 to 1891, and if he had made such inquiry in the vicinity of said land he could easily have ascertained, at any time from 1868 to the time he commenced this suit, that the said Arvida Worthley and this appellant claimed to own the land.

The question presented in this court is as to whether the facts so specially returned by the jury disclosed such adverse possession, by and in favor of the appellant, as to preclude the reassertion, by the appellee, of his title acquired in 1857.

In this State the statute of limitation, Burns' R. S. 1894, section 294 (R. S. 1881, 293), denies a right of action for the recovery of real estate after twenty years from the accrual of the cause of action, and this is the provision upon which the holder of lands in adverse possession for the term of twenty years is held to be the owner.

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The able counsel for the parties agree that ordinarily there are five indispensable elements in this adverse possession, namely: 1. It must be *hostile and under a claim of right*; 2, it must be *actual*; 3, it must be *open and notorious*; 4, it must be *exclusive*; and 5, it must be *continuous*. In this agreement counsel are supported by the authorities. *Ward v. Cochran*, 150 U. S. 597; *Murray v. Hoyle*, 97 Ala. 588, 11 South. 797; *Ringo v. Woodruff*, 43 Ark. 469; *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743; *Noyes v. Heffernan*, 153 Ill. 339, 38 N. E. 571; *Hempsted v. Huffman*, 84 Ia. 398, 51 N. W. 17; *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916; *Haffendorfer v. Gault*, 84 Ky. 124; *School Dist., etc., v. Benson*, 31 Me. 381, 52 Am. Dec. 618; *Beatty v. Mason*, 30 Md. 409; *Middlesex Co. v. Lane*, 149 Mass. 101, 21 N. E. 228; *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962; *Foulke v. Bond*, 41 N. J. L. 527; *Law v. Smith*, 4 Ind. 56; *Peterson v. McCullough*, 50 Ind. 35; *McEntire v. Brown*, 28 Ind. 347; *Richwine v. Presbyterian Church*, 135 Ind. 80; *Silver Creek Cement Corp. v. Union, etc., Co.*, 138 Ind. 297; *Dyer v. Eldridge*, 136 Ind. 654; *Roots v. Beck*, 109 Ind. 472, 1 Am. and Eng. Ency. of Law (2d Ed.), p. 795.

There is no question but that the appellant held, for the required period, the color of title to said lands, and that if she occupied or possessed, as required by the rule in adverse possession, any part of the land such possession will, under such color of title, be held, constructively, to include the whole of such lands. *Hargis v. Inhabitants of Con. Tp.*, 29 Ind. 70; *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383; *State v. Portsmouth Savings Bank*, 106 Ind. 435; *Roots v. Beck*, *supra*; *City of Noblesville v. Lake Erie, etc., R. R. Co.*, 130 Ind. 1, 31 Am. St. 412; *Herff v. Griggs*, 121 Ind.

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471; *Dyer v. Eldridge, supra*; 1 Am. and Eng. Ency. of Law (2d Ed.), p. 847.

The important inquiry, upon the facts found, is as to whether the appellant occupied or possessed, under the rule in adverse possession, any part of the land for the required term. Appellee insists that actual occupancy is necessary, while the appellant urges that occupancy is necessary only where it is possible with some return from the occupancy or use, and is not required if the land is not susceptible of some remunerative use. That there was not an actual occupancy for twenty years by or on behalf of the appellant or her grantors is not in doubt, nor is it questionable that the lands were not available for any productive use. The precise inquiry, therefore, is, what is meant by "possession," as applied to lands of the character of those in question here. It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands, or of a mining camp, a non-navigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot would not answer as to a lot in the business center of a populous and thrifty city. As said in *Ewing v. Burnet*, 11 Peters, 41: "So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases." And, as said in the early case of *Robison v. Swett*, 3 Me. 316, where "lands being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them."

In this connection it is said in 2 Wood on Limitations (2d ed.), section 267: "The kind of possession which will be sufficient must depend largely upon the

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character of the land, the locality, and the purposes to which it can be put. * * * And where the land is so situated as not to admit of any permanent useful improvement, neither residence, cultivation, nor actual occupation are necessary where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own. It is not necessary that the occupation should be such that a mere stranger, passing the land, would know that some one was asserting title to a dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it. The possession of land cannot be more than the exercise of exclusive dominion over it." Numerous cases are cited by the author which support the text. See *Ewing v. Burnet*, *supra*; *Draper v. Shoot*, 25 Mo. 197, 69 Am. Dec. 462; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Royall v. Lessee of Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Eddy v. Gage*, 147 Ill. 162, 35 N. E. 347; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *Whitaker v. Erie Shooting Club*, 102 Mich. 454, 60 N. W. 983; *Twohig v. Leamer*, 48 Neb. 247, 67 N. W. 152; *Mooney v. Cooledge*, 30 Ark. 640; *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454; *Bowen v. Guild*, 130 Mass. 121; *Booth v. Small*, 25 Ia. 177; *Brett v. Farr*, 66 Ia. 684; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Cooper v. Morris*, 48 N. J. L. 607, 7 Atl. 427; *Stockton v. Geissler*, 43 Kan. 612, 23 Pac. 619; *Foulke v. Bond*, *supra*.

It is true, as counsel for appellee insists, that in no one of these cases were there such slight acts of dominion over the lands in dispute as were exercised over those here in controversy during the last few of the twenty years from the first assertion of title by Dib-

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ble, in 1861. But it can as safely be said that in no reported case were the lands in question so wholly unadapted to beneficial use as are the lands involved in this case. No act of dominion is suggested, with reference to the appellant's holding, which was not applicable to lands of productive qualities or subject to gainful use. If, as the cases cited concur in holding, actual residence, occupation, cultivation, enclosure, buildings or improvement are not indispensable, and that the possession necessary, depending upon the character and location of the land, is such as the claimant would exercise over property held in his own right and would not exercise over property which he did not claim, it would be difficult, indeed, to point to some act which the appellant did not but could have exercised, with benefit from the land, evidencing her adverse possession. From 1861 to 1873 fruitless efforts were made from year to year to make some beneficial use of the land, and they were fruitless because the land was not adapted to any fruitful use. Nothing remained to be done to manifest the adverse claim of ownership which would not have been unproductive, and anything else done must have been of a character not to be expected from a sincere claimant.

In Wood on Limitations, section 268, it is said: "In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespassers upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the acts referred to would not be sufficient of themselves to establish title by reason of adverse possession, unless the land was un-

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susceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title." Citing authorities.

The general proposition involved in the authorities we have cited upon this branch of the question was recognized by this court in *Collett v. Board, etc.*, 119 Ind. 27. It was there said: "An entry upon land with the intention of asserting ownership to it, and continuing in the visible, exclusive possession under such claim, *exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission and in disregard of all other conflicting claims*, is sufficient to make the possession adverse." (The italics are our own.)

If the owner absents himself from lands of the character of those here involved and ignores for thirty odd years the known annual tax claims of the county and State against the land, he can but anticipate outstanding colorable adverse title; he cannot expect to be advised from a view of the land that it is in the possession of another, since none of the evidences of occupancy applicable to productive lands are required by law or would be probable from the customs of owners of such lands. The public records of conveyances, transfers and payments of taxes would be a natural and proper source of knowledge, and the open and notorious claim of title by another, evidenced by the general understanding of the people of the neighborhood, gained from the frequent proclamations of the claimant, would afford another means of information. If he visited the land he could see that the ancient timber was gone and that all of value had gone with it. This, while not always sufficient notice of an adverse claim or possession, would be a circumstance, which,

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coupled with the other sources of notice to be anticipated, was proper to consider, and if all combined were such notice as he might reasonably expect from an adverse title, then they were sufficient notice. We think the facts found by the jury establish every use of the land of which it was capable; that it was such use as was made by the owners of like lands; that the appellant's dominion over the land was such that, under the rules of law already stated, Burbanks was chargeable with notice thereof.

It is said, however, that by the decision of this court in *State v. Portsmouth Savings Bank*, *supra*, the law has been declared to be at variance with the proposition that actual occupancy is not indispensable where it may not be had with beneficial use. On page 461 of the report of that case it was said: "It was impossible for Bright to have had possession of the bed of the lake, unless he in some way had constructive possession, *because, during the time that he claimed to be the owner, it was almost wholly covered with water.*" (The italics are our own.) This statement, it will be observed from a careful reading of the opinion, was made in distinguishing between constructive possession under color of title and actual possession without color of title, with reference to the area to be included in either possession. Standing alone it would not follow that there could be no adverse "possession because" the land "was almost wholly covered with water."

The case of *Whitaker v. Erie Shooting Club*, *supra*; *Brophy v. Richeson*, 137 Ind. 114, and perhaps other cases, illustrate the proposition that there may be a possession of lands covered by water. The question of adverse possession in that case, however, was decided upon the absence of evidence tending to show possession for the required period, and not because such

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possession was impossible. Moreover, if it should be conceded that the bed of a lake, covered with water was not capable of actual possession or occupancy, within the rule in adverse possession, the present case would not stand upon the same rule, for here actual occupancy is possible, but the many cases cited hold that it is not necessary where the land is not adapted to any beneficial use.

We conclude that the court erred in rendering judgment upon the verdict in appellee's favor, and the judgment is reversed, with instructions to render judgment upon said verdict in favor of appellant.

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[No. 17,403. Filed January 12, 1897.]

146	545
148	345
152	43
152	240
152	242
146	545
154	228
146	545
159	620
159	624

CORPORATION.—*May Deal with Its Property as an Individual When Not Restrained by Statute.*—A private corporation, unless restrained by statute, may legitimately deal with its property in the same manner that an individual deals with his.

MORTGAGE.—*Preferences.*—Where a mortgage or other security is given to secure an honest debt, and is in a *bona fide* manner accepted for that purpose, the fact that the giving and accepting of such security may result in defeating the claims of other creditors, affords no legal or equitable grounds for complaint on the part of the latter.

CORPORATION.—*Insolvency.—Trust.—Creditors.*—An insolvent corporation does not hold its property in trust or subject to a lien in favor of creditors in any other sense than does an individual debtor.

SAME.—*Insolvency.—Preferences.—Directors.*—A preference made by an insolvent corporation to some of its directors, who voted in favor thereof, is not invalid where the vote of such directors was not necessary to the passage of the resolution authorizing the preference.

From the Tippecanoe Superior Court. *Reversed.*

Levering *et al.* v. Bimel *et al.*

Stuart Bros. & Hammond and *Kumler & Gaylord*,
for appellants.

Wallace & Baird, Caldwell & Caldwell, Corwin & Smith, G. P. Haywood and *G. J. Eacock*, for appellees.

JORDAN, C. J.—The questions involved in this cause arise out of the proceedings of the trial and judgment in the lower court in adjudicating claims of the creditors of the O'Brien Wagon Company, a corporation organized under the laws of this State, and engaged in the manufacture and sale of wagons in the city of Lafayette. On August 10, 1893, this corporation being insolvent, was placed in the hands of a receiver by order of the lower court. Appellant, Levering, holder of a certain alleged note against said corporation, which he held as trustee of the First National Bank and the Merchants' National Bank of Lafayette, Indiana, filed his intervening petition in the cause in which said receiver was appointed, wherein he averred that said note of \$39,400.00 which he so held was secured by a chattel mortgage executed by said company, and he asked that this mortgage be foreclosed and that the proceeds of the sale of the mortgaged property be ordered by the court to be first applied to the payment of this claim. At the same time his co-appellant, Lucy A. Kaul, filed a like petition, in which she alleged that she held a note against said company for \$48,360.00, secured by a mortgage upon its real estate, and by a chattel mortgage upon certain personal property, etc.

Appellees, being unsecured creditors of the corporation, were by the court permitted to appear and file answers to these intervening petitions, and to defend against said claims and mortgages. Upon these petitions, and the respective answers and replies of the

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parties, the issues were joined, and the cause was tried by the court. There was a special finding of facts, and by its conclusions of law thereon, the court held that the note and mortgage held by Levering were illegal and void, and also that the note and mortgages held by Mrs. Kaull were illegal, and that the action of the corporation in assigning certain notes and accounts to her as collateral security, was illegal and void, and judgment was rendered accordingly.

The facts material to the principal questions involved appear from the special finding to be substantially as follows: On July 14, 1890, the O'Brien Wagon Company was duly incorporated at Lafayette, Indiana, with a capital stock of \$100,000.00, the object of said corporation being to manufacture and sell wagons at said city. Before the incorporation of this company it operated and carried on its business at Tiffin, Ohio, as a partnership, but was induced to locate at Lafayette, where, as before stated, it was incorporated under the general laws of this State. On August 7, 1893, this corporation was indebted, as the court finds, to the First National Bank of the city of Lafayette, Indiana, as follows:

On ten notes executed by the wagon company to said bank for borrowed money...	\$11,500.00
On five notes, executed by the wagon company to F. M. Ward, and endorsed by him to said bank.....	3,790.40
On one note executed by the wagon company to Frey, Reiff & Co., and by them endorsed to said bank.....	189.15
All of which it is found, with interest, amounted, on August 7, 1893, to.....	\$16,139.46
On endorsement of other notes.....	9,396.83
Total	\$25,536.29

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On nine of the notes first mentioned Burt J. Kaull was a surety for the company, and Richard Carpenter was a surety for the company on the other note of said ten. Carpenter and Kaull being at the time directors of said corporation; the former being the president and the latter secretary. It is further found that on the date last mentioned, the company was also indebted to the Merchants' National Bank of said city as follows:

On four notes executed by the wagon company to said bank for borrowed money...	\$ 7,623.79
On two notes executed by the wagon company to Frey, Reiff & Co., and by them endorsed to said bank.....	874.54
On endorsements of promissory notes.....	7,572.12
Total	\$16,070.45

On the four notes first named said Burt J. Kaull was also surety for the company.

The court also finds: "That all the indebtedness from said corporation to said banks was for money on direct loans to said corporation or for discount of commercial paper, governed by the law-merchant, during the months of April, May, June and July, 1893, and while said corporation was carrying on its business, and that all of said money was used by said corporation in the ordinary course of business."

On August 9, 1893, Lucy A. Kaull, appellee, it appears, held certain notes or claims against said corporation, which aggregated \$48,360.10, part of it being for money advanced and loaned by her to the corporation. That all of the notes held by Mrs. Kaull were signed by said Burt J. Kaull, as surety, he being the son of the former and a director of said company at the time the notes were executed by it to his said mother. As to these notes the court finds that on said

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9th day of August, there was only due to Mrs. Kaull from said corporation the sum of \$24,368.41, and no more. That as to the remainder of her said claim the company had received no consideration for the execution of the notes and that the same were executed without authority from its board of directors. On the 7th day of August, 1893, the corporation, by its board of directors, authorized the execution of a note for all of the preexisting indebtedness due from it to said banks, together with a mortgage on the personal property of the company to secure said note, and that immediately thereafter the note for \$39,400.00 and the mortgage to secure the same, as set out in Levering's petition, were executed to him by the president and secretary, and Levering thereupon executed a declaration of trust to both of said banks. That before the execution of this note and mortgage these banks surrendered to Levering all the notes held by them upon which the company was liable. That on August 9, 1893, the company, by its board of directors, authorized the execution of a note, and a mortgage to secure the same, to Lucy A. Kaull for the indebtedness held by her against the corporation, and in pursuance thereof the note and mortgages set up in her petition were executed to her by the corporation. The execution of the notes and mortgages to Levering and Mrs. Kaull was authorized by the unanimous vote of all the directors, being five in number, and the execution of these notes was also approved by the stockholders of said corporation. Payments on the note to Levering were made after its execution and before the trial of the cause, which reduced the amount due when the judgment was rendered to \$31,667.95. At the time of the execution of the mortgages in dispute, Carpenter was insolvent, and Burt J. Kaull had no property in this State, but owned some outside of Indiana. It is

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also found that the latter was the agent of Mrs. Kaull in obtaining the mortgage set out in her petition. That on the 7th and 9th of August, 1893, said corporation was insolvent, which fact was known to its officers, and that Mrs. Kaull also knew at the time of the execution of the note and mortgage to her of its insolvency. That on the 9th day of August, 1893, Eugene N. O'Brien, a stockholder and one of the directors, a few hours after the execution of the mortgage to Mrs. Kaull, filed a petition to have a receiver appointed for said corporation, and that it, on the next day, appeared by its attorneys and consented to the appointment of a receiver, and that thereupon a receiver was appointed by the court, that he duly qualified and assumed the duties of his trust. It is further disclosed by the finding that each of said banks, at the time of the execution of the mortgage, knew that Burt J. Kaull and Carpenter were directors of the corporation and liable as sureties on said notes. On August 2, 1893, a part of the employes of said company quit work on account of the reduction of wages, and thereafter only a few men were employed for the time being in finishing work and in the shipping department. That on said 7th day of August, the assets of said corporation were \$75,000.00, and its direct liabilities \$116,368.00, and its contingent liabilities \$20,000.00.

Other facts are found, some of which are more in the nature of conclusions than a finding of facts. Fraud, however, as a fact is not found by the court in its special findings. Neither is it in any way disclosed that the amounts found due to the appellees respectively by the court were not *bona fide* preexisting indebtedness against said corporation at the time of the execution of the mortgages. It is conceded by appellee's learned counsel that the findings and conclu-

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sions of law as made and stated by the court do not proceed upon the theory of actual fraud in fact, but upon the theory that the notes and mortgages in question, and also the assignments of certain notes and accounts to Mrs. Kaul as a collateral security, as found by the court, were illegal and void by reason of the facts stated in the special finding. The contention of counsel for appellees, as stated by them, is that:

“A corporation organized under the laws of this State, after it has become insolvent and has abandoned the further prosecution of its business, cannot mortgage or pledge its property for the sole purpose of giving some of its creditors a preference over others in the distribution of its assets, especially if such preference inures to the personal benefit of some of the directors of such corporation.”

They admit that an insolvent corporation may secure some of its creditors by mortgage or otherwise, provided it be a going concern and the security is given for the purpose of enabling it to prosecute its business and with the expectation that it will continue to do so. It is true, they say, that a natural person may make any honest disposition of his property, but a corporation in this State can do only what it is expressly authorized to do by the law under which it is created and operates, and such other acts as are essential to carry into effect the powers granted.

The learned counsel for the appellants, on the other hand, insist that the rights of a corporation, in regard to preferring its creditors, must be the same as natural persons, and that the notes and mortgages under the facts in this case must be held valid and enforceable obligations, at least to the amount found to be due by the court. This question then, as asserted and denied by the parties to this appeal, may be said to be the cardinal one presented for our decision. The

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decisions of this court recognize the rule that a private corporation, unless restrained by statute, may legitimately deal with its property in a manner similar as an individual deals with his. *Bristol, etc., Co. v. Probasco*, 64 Ind. 406; *Ward v. Polk*, 70 Ind. 309; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. 412; *DeCamp v. Alward*, 52 Ind. 468; *Park, etc., Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73; *Hill v. Nisbet*, 100 Ind. 341.

A natural person has absolute dominion over the disposition of his property, provided such disposition does not result in defrauding his creditors. Under this right an insolvent debtor may, in good faith, prefer one or more of his *bona fide* creditors to the exclusion of others. Where a mortgage or other security is given to secure an honest debt, and is in a *bona fide* manner accepted for that purpose, the fact that the giving and accepting of such security may result in defeating the claims of other creditors, affords no legal or equitable grounds for complaint upon the part of the latter. This doctrine is settled in this State by many decisions, of which the following are a part. *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285; *Ball v. Barnett*, 39 Ind. 53; *Cushman v. Gephart*, 97 Ind. 46; *Grubbs v. Morris*, 103 Ind. 166; *Gilbert v. McCorkle*, 110 Ind. 215; *Hays v. Hostetter*, 125 Ind. 60; *Straight v. Roberts*, 126 Ind. 383; *Carnahan v. Schwab*, 127 Ind. 507; *Dice v. Irvin*, 110 Ind. 561; *Fuller and Fuller Co. v. Mehl*, 134 Ind. 60.

Blackstone, in his Commentaries, says that it is necessarily and inseparably incident to every corporation aggregate that it has power to sue, or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as a natural person may. Blackstone's Comm. (Cooley's ed.), Vol. 1, star p. 475.

In Angell & Ames on Corporations, section 187, p.

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168, it is asserted that independently of positive law, all corporations have the absolute *jus disponendi* neither limited as to objects nor circumscribed as to quantity.

Morawetz in his Law on Private Corporations, Vol. 2, section 802, says that in the absence of a statutory prohibition, a corporation has the same power of making preferences among its creditors as an individual.

Beach in his work on Corporations, Vol. 1, section 358, says, that a corporation, unless prohibited by law, may sell and transfer its property and may prefer its creditors, although insolvent even when all of its property be conveyed in the payment of a single debt, leaving other creditors unpaid. The fact that a solvent corporation, under the law, in this State has the power to borrow money and secure the payment thereof by mortgage, on its property or otherwise, the same as an individual, is not controverted by appellees. Upon what reasonable grounds then, can it be said that an insolvent corporation, in the absence of legislation to the contrary, has not the power, under like circumstances as an insolvent, natural person, to make a preference among its *bona fide* creditors? Appellees, however, seek to show a distinction by invoking the trust fund doctrine, which is recognized by the courts in some of our sister states, upon the theory apparently that the directors of a corporation are the trustees for all of the creditors. As between the corporation and its creditors, it cannot, in reason, be said that the relation is anything more than that of debtor and creditor. The relation of trustee and *cestui que trust* does not exist so as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor. This court recently had the question of this trust fund doctrine presented for its consideration, and declined to accept it as it is urged now by the appellees. We held that it did not exist

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before a corporation is placed under the control of a court for adjustment of its affairs; that until such an event happens, no special lien upon its assets or property exists in favor of any creditor or class of creditors, and that the corporation, prior to such an event, had the power, and right to prefer its creditors in like manner and under like circumstances as individuals or co-partnerships may do.

This rule must now be considered as settled in this jurisdiction. See *Henderson v. The Indiana Trust Co.*, 143 Ind. 561; *First Nat'l Bank, etc. v. Dovetail Body, etc., Co.*, id. 534, 550, and the many authorities cited in the opinions.

By these decisions it is also, in effect, held that an insolvent corporation is not to be denied the right to prefer a creditor or creditors, when such preference does or may inure to the benefit of some of its officers who are sureties upon the claims of the creditors preferred. It being true, then, as a legal proposition, that an insolvent corporation may, in like manner as a natural person, prefer its creditors, upon what logical or reasonable grounds can it be said that a holder of a *bona fide* indebtedness against the former cannot be preferred, for the reason that some of the directors are the sureties for the corporation for the payment of said indebtedness? See *Worthen v. Griffith*, 59 Ark. 562, 28 S. W. 286, 43 Am. St. 50.

The broad doctrine that the officers of a corporation cannot in their own names contract with it is unreasonable. Such a holding would virtually deny to corporations the credit upon which their business may be transacted. If the right of the stockholders and officers of a corporation to advance money to it to carry on its affairs, or to endorse for it to obtain money for such purpose, is denied, it would result in depriving the corporation of its most ready and frequent source

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of credit. If directors can lend money to the corporation, or endorses for it, under the laws in this State, they should certainly have the right to collect their debt or be secured therein as is accorded by the law to other creditors. *Schufeldt v. Smith*, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. 628.

Where, however, an officer of an insolvent corporation is preferred, the rule properly asserted by the authorities is, that such act, when assailed, should be closely scrutinized by the court, and the burden will be cast upon the preferred officer to establish that he held a *bona fide* debt against the corporation. *Schufeldt v. Smith*, *supra*, and authorities there cited.

While it may be said that if a corporation is allowed to make preferences that will inure to the benefit of its officers, that this will enable the latter, by reason of the position which they occupy, to outstrip the other creditors in the race of diligence in collecting or securing claims. This fact, however, cannot be deemed sufficient to deny it the right to prefer its creditors. An individual debtor may prefer his wife, or any other member of his family, provided, of course, the preferred debt is an honest one. No more equity or reason appear for allowing an individual to do this, than in permitting a corporation to prefer its own stockholders or officers. It is true that they have an advantage over others in this respect, but this vantage ground results from their position, and is known to every one who deals with the corporation or extends it credit. See *Buell v. Buckingham & Co.*, 16 Ia. 284.

As said by Judge Dillon, in this latter case: "Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors and run a race of vigilance with them, availing himself in the contest, of his superior knowledge and of the advantage of his position, to obtain security

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for, or payment of, his debt." All preference by insolvent debtors are inequitable. They result in favoring one creditor over another, equally entitled to such favor or preference. The insolvent person is generally prompted by his own feelings to prefer his friends; in fact, the rule which permits insolvents to prefer their creditors has resulted in much evil, but it is so firmly established that it cannot consistently be overthrown by judicial action, but the legislative department should interpose and regulate and control this right by statute.

The decisions of this court upon the question of preference by an insolvent corporation and the holding that the trust fund doctrine applied to the extent insisted upon by appellees, cannot be upheld, are in harmony with the great current of decisions, both of state and federal courts.

In addition to those cited in the opinions of this court in the previous cases, we cite the following: *Worthen v. Griffith, supra*; *Shufeldt v. Smith, supra*; *The Waggoner, etc., Co. v. Zeigler, etc., Co.*, 128 Mo. 473, 31 S.W. 28; *Bank of Montreal v. Potts, etc., Lumber Co.*, 90 Mich. 345, 51 N.W. 512; *Meyer v. American, etc., Co.*, 130 Mo. 188, 32 S.W. 300; *Thompson-Houston, etc., Co. v. Henderson, etc., Co.*, 116 N.C. 112, 21 S.E. 951; *Planters Bank v. Whittle*, 78 Va. 737; *Lexington, etc., Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Coats v. Donnell*, 94 N.Y. 168; *Santa Cruz, etc., R. R. Co. v. Spreckles*, 65 Cal. 193, s. c., 3 Pac. 661; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Catlin v. Eagle Bank*, 6 Conn. 233.

Neither of the appellants in this appeal were stockholders or officers of the corporation, but strangers thereto, hence the question of a preference by an insolvent corporation to its own officers for debts held by them against such concern is not directly involved,

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and consequently the reasoning and holding herein must be limited to the fact in this respect, that the directors in question were but sureties upon the claims preferred.

It is also insisted by appellees that the fact that the preferences in the case at bar were authorized by the votes of the two directors who were the sureties upon the notes of the preferred creditors rendered the mortgages illegal. But the execution of the mortgages, as it appears, was authorized by the unanimous vote of the five directors, being the entire directory. Consequently, a majority of the directors, constituting a quorum, by their votes authorized the preference, independent of the votes of the two who were the sureties, therefore, the principle asserted in the case of *Buell v. Buckingham & Co., supra*, would apply. It was held in that case that a preference made by an insolvent corporation to its president, by a vote of its directors, sufficient without counting the vote of the former, was valid.

The facts do not establish that the corporation in question took any steps itself to apply for a receiver when it executed the mortgages in dispute. Neither does it appear that the placing of the concern in the hands of a receiver and the act of preferring the claims of appellants were a part of the same transaction, so as to bring it within the principle affirmed in *Shillito Co. v. McConnell*, 130 Ind. 41.

It is disclosed by the finding that the money loaned by the banks and Mrs. Kaul to this company was loaned at a time when it was carrying on its business. We fail to recognize anything under the facts that will take these preferences to the appellees out of the protection of the rule which we sustain and adhere to, relative to the right of an insolvent corporation to prefer its creditors in like manner as a natural person.

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As the judgment must be reversed as to both of the appellants for the error of the court in holding the mortgages in controversy invalid, we do not determine the question, under the evidence, as to the consideration of that part of Mrs. Kaul's claim disallowed by the court. There is such a controversy as to the amounts that should be allowed to both of the appellants, that we are of the opinion that justice can be best subserved by ordering a new trial upon all of the issues.

The judgment as to both of the appellants is therefore reversed, and the cause is remanded to the lower court, with directions to vacate its judgment and grant appellants a new trial, and for further proceedings not inconsistent with this opinion.

FISHER, ADMINISTRATOR, v. LOUISVILLE, NEW ALBANY
AND CHICAGO RAILWAY COMPANY.

[No. 17,998. Filed January 12, 1897.]

SPECIAL VERDICT.—*Failure to Find as to Material Fact in Issue.*—

Presumption.—When any fact material to the issue is not set forth in a special verdict, the presumption is that there was not evidence sufficient to establish such fact, and the same is treated as found against the party having the burden of proof as to such fact.

NEGLIGENCE.—*Willfulness.*—To constitute a willful injury the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.

SAME.—*Contributory Negligence.*—*Railroad.*—In an action against a railroad company for the alleged negligent killing of a section hand, freedom from contributory negligence is not sufficiently shown where there is no evidence as to what deceased was doing at the time he was struck by the train.

SAME.—*Willful Killing.*—*Railroad.*—A finding against a railroad company for a willful killing of a section hand, who was standing

146	558
146	575
146	558
149	70
149	135
149	499
150	161
146	558
156	629
146	558
156	206

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on the track, is not warranted in the absence of evidence showing what the deceased was doing at the time, even though the track was clear and deceased could have been seen from the cab of the engine for half a mile, and no signals were given of the approach of the train.

From the Newton Circuit Court. *Affirmed.*

S. P. Thompson and D. J. Thompson, for appellant.

E. C. Field, W. S. Kinnan and Cummings & Darroch, for appellee.

MONKS, J.—Appellant brought this action to recover damages for the death of Benjamin Fisher, an employe of appellee, who was killed by one of appellee's trains.

The complaint is in two paragraphs. The first paragraph alleges that the death was caused by the negligence of appellee and without the fault of the decedent.

The second paragraph charges that appellee willfully and purposely killed the decedent. The jury returned a special verdict, and appellant moved for a judgment in his favor, which was overruled and judgment rendered in favor of appellee.

The special verdict, so far as necessary to the determination of the questions presented, is substantially as follows: On July 19, 1895, Benjamin F. Fisher was, and had been, in the service of appellee as a section man for about three months, and while in such service was struck and killed by a locomotive owned and operated by appellee, and which was attached to an extra freight train not running on any schedule time and following about one mile behind the regular local freight train, which had passed the decedent about five minutes before he was killed. That a high wind was blowing from the northwest to the southeast at the time. The deceased was killed about half

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way between the village of Surrey and the first public highway southeast of said village. The railroad crosses two public highways, about one mile south of said village, one about eighty rods from the other; the track for a distance of about three-quarters of a mile to the southeast of where the deceased was killed, was straight and unobstructed in view from the cab of the locomotive as it approached the place where the decedent was killed. Appellee's engineer and fireman could have seen decedent at work upon said railroad in approaching him for the distance of at least one-half a mile. The engineer in charge of the locomotive drawing the extra freight train did not give any signal at the highway crossing first south and about one-half mile from where the decedent was at work, or give any warning as the train approached the decedent. The deceased would not have heard the whistle if sounded at said highway crossing, but would have heard the danger signal as the extra freight train approached him from the southeast, if it had been sounded. The train was going at about twelve to fifteen miles per hour when the decedent was killed. The deceased was a man about forty-one years of age, with his eyesight good, and was in the full possession of his faculties. He could have seen the train approaching for about one mile if he had looked, and could have heard the noise of the approaching train in time to have avoided danger if he had listened. The special verdict states that there was no evidence as to what the decedent was doing when he was killed, whether he looked or listened, or as to whether he saw and heard the train approaching in time to avoid it or not.

To entitle appellant to judgment in his favor upon the special verdict, under the issues joined, it is essential that the facts found should show that the

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death of Fisher was caused by the negligence of the appellee, and without any fault on the part of said decedent, or that he was willfully killed by the appellee. *O'Neal v. Chicago, etc., R. W. Co.*, 132 Ind. 110.

In determining whether the facts found are sufficient to entitle the person having the burden of proof to a judgment this court can only consider the facts properly found, disregarding evidentiary facts, legal conclusions and matters not within the issues; and when any fact material to any issue is not set forth, the presumption is that there was not evidence sufficient to establish such fact, and the same is treated as found against the party having the burden of proof as to such fact. Nothing can be added by inference or intendment. *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Indiana, etc., R. W. Co. v. Barnhart*, 115 Ind. 399, and cases cited; *Cook v. McNaughton*, 128 Ind. 410, and cases cited; *Town of Freedom v. Norris*, 128 Ind. 377; *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533.

There are no facts showing that the appellant's intestate was in the exercise of ordinary care when he was killed. He could have seen the approaching train for a mile, and could also have heard the noise of the train in time to have avoided danger. There is no finding that he did or did not look or listen, or that he did not see or know the train was approaching in time to have avoided the danger. For all that is shown by the special verdict he saw and heard the train approaching and neglected to go from the track until it was too late. Under the authorities cited, therefore, the failure to find facts showing that the decedent was without fault is equivalent to a finding against appellant on this issue. It is evident, therefore, that appellant was not entitled to a judgment in his favor, unless the facts found show that the appel-

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lee willfully and purposely killed the decedent, as alleged in the second paragraph of complaint. When any injury is willfully inflicted it is not necessary to prove that the person injured was free from contributory negligence. *Brannen v. Kokomo, etc., Gravel Road Co.*, 115 Ind. 115.

Can this court say, as a matter of law upon the facts found, that appellee willfully caused the death of the intestate?

To constitute a willful injury the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard of the safety of others and a willingness to inflict the injury complained of. *Brannen v. Kokomo, etc., Gravel Road, supra*, and cases cited; *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242; *Parker, Admr., v. Pennsylvania Co.*, 134 Ind. 673; *Conner v. Citizens' Street R. R. Co.*, ante, 430.

The special verdict shows that the engineer and fireman upon the approaching train could have seen the decedent when a half mile from where he was killed, but that no danger signals were given as the train approached him. It is not found or shown that they, or either of them, saw him, or knew that he or any one else was at work on or near the track before he was killed. Neither does the verdict show what the decedent was doing, as the train approached, or when he was killed, or that he was engaged in work and was so absorbed that he did not know that the train was approaching. It is true, that in answer to one interrogatory the jury found that he was working as appellee's section man in ballasting the track. But the jury, in answer to other interrogatories, find that there was no evidence showing what he was doing at and before the time he was struck by the train.

Considering these interrogatories and the answers

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together, the jury found that the decedent was, on the day of the injury, an employe of the appellee and engaged in the line of his duty as a section hand in ballasting the railroad track under the direction of the section foreman, but that at the time he was struck by the train the jury could not find what he was doing, because there was no evidence of what he was doing at that time.

For all that appears from the special verdict, the decedent may have been looking at the train as it approached, and appellee's employes did not give the danger signal for the reason that they could see that the decedent was looking at the train and knew that it was approaching him. Under such circumstances the failure to give the danger signal would not be negligence. The engineer would have the right to assume that the decedent would step aside in time to avoid the danger. *Indianapolis, etc., R. R. Co. v. McClaren, Admr.*, 62 Ind. 566. If, under such circumstances, appellee's train ran upon the decedent and caused his death, there would be no liability, because appellee would not be guilty of even negligence, and the decedent would be guilty of negligence contributing to his injury.

Under the rule that nothing can be added by intendment, it is clear that we cannot say, as a matter of law upon the facts found, that the death of appellant's intestate was willfully and purposely caused by appellee, nor even by its negligence.

The judgment is, therefore, affirmed.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. BATES, ADMINISTRATOR.

[No. 17,857. Filed Nov. 11, 1896. Rehearing denied Jan. 12, 1897.]

PLEADING.—Negligence.—Complaint.—A general allegation of negligence in a complaint is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the facts pleaded. *p. 566.*

SAME.—Negligence.—Complaint.—Motion to Make More Specific.—The defendant may by a motion to make more specific require plaintiff, in an action for personal injuries, to state the specific acts or omissions of the defendant which constitute the negligence relied upon. *pp. 566, 567.*

RAILROADS.—Must Furnish Reasonably Safe Cars and Other Appliances.—Inspection.—It is the duty of a railroad company to exercise ordinary care in furnishing reasonably safe cars and other appliances, and also to exercise ordinary care, by inspection and repair, to keep them in reasonably safe condition, so as not to unreasonably expose its employes to unknown and extraordinary hazards. *p. 567.*

SAME.—Not Required to Furnish Cars and Appliances that are Absolutely Safe.—A railroad company is not required to furnish cars or appliances that are absolutely safe, or to maintain them in that condition. The company is not an insurer of the safety of the employes against injury. *p. 567.*

SAME.—Impracticable or Unreasonable Tests of Cars and Appliances Not Required.—A railroad company is not required to resort to tests of cars and other appliances that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of its business. *p. 568.*

SAME.—Duty as to Inspection of Foreign Cars.—The duty of a railroad company as to foreign cars received in regular course of business for transportation over its lines is that of exercising ordinary care in inspecting the same to see if they are in reasonably safe condition of repair, and if found to be out of repair, to put them in a reasonably safe condition of repair, or notify its employes of the condition of such cars. A greater degree of care would be required if such cars were old or obviously defective. *pp. 568, 569.*

SAME.—Receiving Cars of Different Construction.—Negligence.—A railroad company is not negligent in receiving and passing over its lines cars different in construction from those owned and used by itself, if the same are not out of repair, or in such a defective condition as can be discovered by ordinary care. *p. 570.*

146	564
150	160
150	161
150	403
152	610

146	564
153	518
153	618

146	564
156	352

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158	205

146	564
161	85
162	118

146	564
163	572

146	564
170	4
170	26

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SPECIAL VERDICT.—*When it Includes Matters Outside the Issues.*—If the special verdict of the jury includes findings of evidentiary facts, conclusions of law, and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found. pp. 570, 571.

RAILROADS.—*Inspection of Foreign Car.*—*Special Verdict.*—In an action against a railroad company for the death of a brakeman caused by an unknown defect in the couplings of a foreign car, a special verdict found that the couplings were apparently in proper position and in good repair, that the defects were not observable, and that deceased had no notice or reason to think said couplings were in any way out of repair. It was further found that the railroad company maintained a resident car inspector whose duty it was to inspect all cars before placing them in trains of said company at said station; that said inspector made a hurried and superficial test without tools, such test not occupying to exceed five minutes, by which inspection the defects were not discovered; that to have made an efficient and proper inspection and examination would have required fifteen minutes; and with no other inspection said car was ordered into said train. That the defective condition of said couplings could easily have been discovered by a reasonable and ordinary inspection thereof by said inspector if competent to make the same, and that the evidence did not show said inspector to have been competent. *Held*, that the facts found failed to show that the inspection was not made in the usual and ordinary manner and was not such as the requirements and exigencies of commerce will permit. pp. 571-573.

SAME.—*Presumption as to Car Inspector's Competency.*—A railroad company is not required to prove that its car inspector was "sufficiently skilled and competent" to act at a particular place. Competency will be presumed until the contrary is shown. p. 573.

From the White Circuit Court. *Reversed.*

E. C. Field and *W. S. Kinnan*, for appellant.

Artman & Lewis and *Davidson & Storms*, for appellee.

MONKS, C. J.—Appellee's intestate, while in appellant's service as brakeman, was killed when in the act of coupling cars upon appellant's road, and this action was brought to recover damages therefor upon the ground that his death was caused by appellant's negligence.

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Appellant's demurrer for want of facts to the amended complaint was overruled. After issue was joined the cause was tried by a jury and a special verdict returned.

Appellant moved the court to render judgment in its favor on said verdict, which motion the court overruled and rendered judgment in favor of appellee.

These rulings of the court are severally assigned as error.

The objections urged against the complaint are such as could only be presented by a motion to make more specific.

It has been uniformly held in this State that a general allegation of negligence is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the facts pleaded, and that under such allegation the facts constituting the negligence may be given in evidence. The same rule applies to the averment that the injured party was without fault or negligence. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *City of Elkhart v. Witman*, 122 Ind. 538; *Cleveland, etc., R. W. Co. v. Wyant*, 100 Ind. 160; *Hammond v. Schweitzer*, 112 Ind. 246; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551, and cases cited; *Town of Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124.

It is equally well settled that a defendant in an action for personal injuries is entitled to have the complaint state the specific acts or omissions of the defendant which constitute the negligence relied upon, as well as all the surroundings and existing conditions and what occurred at the time of the injury. *Peerless Stone Co. v. Wray*, 143 Ind. 574; *Pittsburgh, etc., R. W. Co. v. Adams*, *supra*; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225; *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526; 54 Am. Rep. 334; *Town of Rushville v. Adams*, *supra*; *Louisville, etc.,*

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R. W. Co. v. Shanklin, 94 Ind. 297; *Louisville, etc., R. W. Co. v. Krimming*, 87 Ind. 351.

While this is true, it requires a motion to make more specific to obtain such relief, and unless such motion has been made and overruled and proper exception saved, no question can be presented here as to such matter. The court did not err in overruling the demurrer to the amended complaint.

The special verdict shows that appellant received a car from another company at Frankfort, Indiana, for transportation over its lines, and that appellee was injured while attempting to couple the same to a locomotive on appellant's road.

The first question presented by the motion for a judgment on the special verdict in favor of appellant is as to the liability of railroad companies to employes for injuries occasioned by a defect in foreign cars received only for transportation over its lines.

It is the duty of a railroad company to exercise ordinary care in furnishing reasonably safe cars and other appliances, and also to exercise ordinary care by inspection and repair to keep them in reasonably safe condition, so as not to unreasonably expose its employes to unknown and extraordinary hazards. *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *Hoozier Stone Co. v. McCain, Admr.*, 133 Ind. 231.

The railroad company is not required to furnish cars or appliances that are absolutely safe, or to maintain them in that condition. The company is not an insurer of the safety of the employes against injury. *Indiana Car Co. v. Parker*, 100 Ind. 181. *Cincinnati, etc., R. W. Co. v. Roesch*, 126 Ind. 445; *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Am. St. 944, 20 Atl.

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517; *Washington etc., Railroad Co. v. McDade*, 135 U. S. 554, 570, and cases cited.

The company is not liable for injuries caused by hidden defects of which it had no knowledge, and of which it could not have known by the exercise of ordinary care.

The master is only charged with knowledge of that which by the exercise of ordinary care he would have discovered.

He is not required to resort to tests that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of business, and which are only required to insure absolute safety. *Smith v. Chicago, etc., R. W. Co.*, 42 Wis. 520; *Grand Rapids, etc., R. W. Co. v. Huntly*, 38 Mich. 537, 546, and cases cited; *DeGraff v. New York, etc., R. W. Co.*, 76 N. Y. 125; *Lafflin v. Buffalo, etc., R. W. Co.*, 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Flood v. W. U. Tel. Co.*, 131 N. Y. 603, 30 N. E. 196; *Phila., etc., R. R. Co. v. Hughes*, 119 Pa. St. 301, 33 Am. and Eng. R. R. Cases, 348, and note 13 Atl. 286; Wharton on Negligence, p. 213.

If the duty of inspection has been performed with ordinary care and a defect is found afterwards to exist, but not discovered at the time, the master is not liable for an injury caused thereby, unless he had knowledge of such defect. *Hull v. Hall*, 78 Me. 114, 3 Atl. 38; *Nason v. West*, 78 Me. 253, 3 Atl. 911; *Baldwin v. St. Louis, etc., R. W. Co.*, 68 Ia. 37, 25 N. W. 918.

The duty of a railroad company as to foreign cars received in regular course of business for transportation over its lines is that of exercising ordinary care in inspecting the same to see if they are in reasonably safe condition of repair, and if found to be out of repair to put them in a reasonably safe condition of repair, or notify its employes of the condition of such

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cars. Appellant, therefore, owed its employes the duty of making proper inspection of the car in question, and either repairing or giving notice of its defects, if any were found. *Chicago, etc., R. R. Co. v. Fry*, 131 Ind. 319; *Cincinnati, etc., R. R. Co. v. McMullen, supra*; *Penn., etc., R. W. Co. v. Sears*, 136 Ind. 460; *Pittsburgh, etc., R. W. Co. v. Adams, supra*; *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378; *Salem Stone Co. v. Griffin*, 139 Ind. 141.

The inspection which a company is required to make of such a car is not merely a formal one, but should be made with ordinary care, that is, the inspection should be such as the time, place, means and opportunity, and the requirements and exigencies of commerce will permit. If the company has used ordinary care to secure competent inspectors and inspection is made with ordinary care, under the circumstances, taking into consideration the time, place, means and opportunity for inspection, and the defects, if any discovered, are repaired or due notice thereof given to the employe, the duty resting upon the company is discharged. It is not liable for injuries caused by hidden defects which could not be discovered by such inspection as the exigencies of the traffic will permit. *Chicago, etc., R. W. Co. v. Fry, supra*.

The company receiving such foreign car is not bound to repeat the tests which are proper to be used in the original construction of the car, but may assume that all parts of the car which appear upon examination to be in good condition are in such condition. *Ballou v. Chicago, etc., R. W. Co.*, 54 Wis. 257, 11 N. W. Rep. 559, 41 Am. Rep. 31.

It would seem that if such car were old, dilapidated, or obviously defective, ordinary care would require a more careful inspection than if there was nothing un-

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usual in its appearance. *Chicago, etc., R. W. Co. v. Fry, supra*, p. 327.

A railroad company is not negligent in receiving and passing over its lines cars different in construction from those owned and used by itself, if the same are not so out of repair or in such a defective condition as can be discovered by ordinary care. *Baldwin v. Railway Co.*, 50 Ia. 680; *Indianapolis, etc., R. R. Co. v. Flanigan*, 77 Ill. 365; *Kohn v. McNulta*, 147 U. S. 238, and cases cited.

It is insisted, however, by appellant that "the court held in *Ncutz v. Jackson Hill Coal and Coke Co.*, 139 Ind. 411, that inspectors of a foreign car received for transportation are fellow-servants of those operating the train." The cars in that case were delivered to the Jackson Hill Coal and Coke Co., the appellee, on its switch, by a railroad company for the purpose of permitting said Jackson Hill Coal and Coke Co., the appellee, to load them with coal. Said appellee did not receive cars for transportation over any line of railroad, and was not engaged in any such business. The rule applicable to railroad companies in regard to inspecting foreign cars did not therefore apply to the appellee in that case. *McMullen v. Carnegie*, 158 Pa. St. 518, 23 L. R. A. 448, 27 Atl. 1043.

Appellant insists that the special verdict does not find facts from which the court can say that the inspection made was not such as is usually made by ordinarily careful and prudent inspectors under like circumstances, and that, therefore, as there is no finding of facts showing the want of ordinary care on the part of appellant, the judgment should have been rendered on the verdict in favor of appellant.

The purpose of the special verdict is that the jury may find the facts within the issues made by the pleadings, and the court then declares the law there-

on. If the special verdict includes findings of evidentiary facts, conclusions of law and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found.

That part of the special verdict essential to the determination of this question is as follows:

“Thirteenth. When standing upon the track, the drawbar and couplings of said oil-tank car were apparently in proper position, and in good repair, and the defects and lack of repair were not observable to said Douglas, nor did he have any notice or reason to think that said drawbar or couplings were in any way insufficient or out of repair. They could only have been ascertained by close inspection under the car.

* * * * *

“Fourteenth. At said station, Frankfort, the defendant maintained a resident car inspector, whose duty it was to inspect all cars of defendant and of other companies, before placing them in the trains of defendant at said station; that said inspector did inspect said car, but only superficially and hurriedly, by looking it over without tools or other manual tests, occupying not to exceed five (5) minutes in said inspection, and failing to discover the condition and need of repair of said drawbar and attachments; that to have made an efficient and proper inspection and examination thereof would have required not less than fifteen minutes, and with no other inspection, said car was ordered into said train. The defective condition of said drawbar and attachments could have easily been discovered by a reasonable and ordinary inspection thereof by said inspector if competent to make the same, but said inspector did not make the same, and it has not been shown by the evidence that said inspector was sufficiently skilled and competent to make the same.”

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This court cannot say, as a matter of law, that the car could not have been inspected properly in less than five minutes, or that it was necessary to use "tools or other manual tests." Neither are there any facts found from which we can determine whether the standard of inspection designated as an "efficient and proper inspection and examination thereof" and "a reasonable and ordinary inspection thereof" is the one required by the law.

In making an inspection it is the duty of the inspector to use the usual and ordinary tests, such tools as persons of ordinary prudence use, if any, under like circumstances. No man is held to a higher degree of skill or care than a fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. If the inspection is made in the usual and ordinary way, the way commonly adopted by those in like business, it cannot be said that it was done negligently. In determining whether an inspection was made with ordinary care, a jury can only find facts showing whether the same was made in the usual and ordinary manner, the one commonly adopted by men of ordinary care and prudence engaged in the same business under like circumstances. If it was so performed it was made with due care, and a jury cannot be permitted to say that it was negligent. They cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of a community. *Titus v. Railway Co.*, *supra*; *Iron-Ship Building Works v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Tuttle v. Detroit, etc., R. W. Co.*, 122 U. S. 189.

The finding "that to have made an efficient and proper inspection and examination thereof would have taken fifteen minutes," is a mere conclusion.

The standard thus fixed by the jury may be pred-

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icated upon the proposition that such searching and critical inspection must be made as would insure absolute safety to the employes. This, as we have shown, is not required. Facts, not conclusions, must be stated. The special verdict should state such facts as would show whether the inspection made was such as is usually made under like circumstances by inspectors of ordinary care and prudence, and this would include all facts showing whether the inspection was such as the time, place, means, opportunity, and the requirements and exigencies of the traffic will permit.

The special verdict does not state any facts showing that the car inspector was incompetent. Appellant was not required to prove that the car inspector was "sufficiently skilled and competent" to act as inspector at Frankfort. The presumption in this case is that he was competent until the contrary is shown. *Evansville, etc., R. R. Co. v. Tohill, Admr.*, 143 Ind. 49; *Evansville, etc., R. R. Co. v. Ducl*, 134 Ind. 156, and cases cited.

The presumption is that appellant exercised ordinary care in the selection of the car inspector with reference to fitness and competency, and that the car was inspected with ordinary care; that is, the inspection was such as the time, place, means, opportunity, and requirements and exigencies of commerce would reasonably permit. Disregarding the improper matters contained in the special verdict, the facts set forth do not overcome or contradict this presumption.

It follows that the court erred in rendering judgment in favor of appellee.

It is claimed by appellant that the case made by the verdict does not correspond with the allegations or theory of the complaint. As the cause must be reversed for other reasons, and the complaint may be

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amended before another trial, it is not necessary for us to determine this question.

We think justice requires that instead of directing a judgment upon the verdict that a new trial be awarded.

Judgment reversed, with instructions to award a new trial, with leave to amend the complaint, and for further proceedings not inconsistent with this opinion.

CRAIG v. BENNETT.

[No. 17,934. Filed January 13, 1897.]

EJECTMENT.—*Plaintiff Must Have Title at Commencement of Action.*

—In order to maintain an action for the possession of real estate the plaintiff must have title at the commencement of the action.

A finding that plaintiff became the owner at a time prior to the commencement of the action is not sufficient.

SPECIAL FINDING.—*Nothing Added by Inference.*—Nothing can be added to a special finding of facts by inference or intendment.

SAME.—*Law and Fact.*—*Cannot Aid Each Other.*—The statement of a fact or facts in the conclusion of law cannot make the special finding good which fails to find such fact or facts.

From the Marshall Circuit Court. *Reversed.*

J. D. McLaren, for appellant.

Samuel Parker, for appellee.

MCCABE, J.—Appellee sued the appellant to recover possession of two acres of land situate in Marshall county.

The issue made by the answer of general denial was tried by the court. Upon proper request the court made a special finding of the facts, upon which it stated conclusions of law. The court rendered judgment in favor of the plaintiff upon the special finding pursuant to the conclusions of law.

146 574
148 371

146 574
153 162
158 512

146 574
155 684

146 574
162 641

146 574
163 426

146 574
167 558

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The errors assigned, among other things, call in question the conclusions of law.

The only finding as to plaintiff's title was that: "On December 26, 1854, the plaintiff, Sarah H. Bennett, became the owner in fee-simple by conveyance from James I. Sering of the entire north half of lot 40, in what is known as Sering's partition plat or east addition to the town of Plymouth, being part of section 13, Michigan road lands, in Marshall county, Indiana."

The allegation in the complaint is that the plaintiff is the owner in fee-simple and entitled to the possession of the premises, describing them. That means at the present time.

The plaintiff, in order to maintain such an action, must have title at the commencement of the action. *Inge v. Garrett*, 38 Ind. 96; *Newell on Ejectment*, pp. 360, 361; *Tyler on Ejectment*, pp. 773, 820. And it has been held insufficient to allege title at some previous time. *Wintermute v. Reese*, 84 Ind. 308; *Brown v. Brown*, 133 Ind. 476. But appellee's counsel contends that the finding being that she owned the premises in fee-simple in 1854, about forty years prior, that the presumption must be indulged that that state of title still continues.

But it has long been an established rule in this court that nothing can be added to a special verdict by inference or intendment. *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210, 228; *Pittsburgh, etc. R. R. Co. v. Spencer*, 98 Ind. 186; *Buchanan v. Milligan*, 108 Ind. 433; *Noblesville, etc., Co. v. Loehr*, 124 Ind. 79; *Town of Freedom v. Norris*, 128 Ind. 377; *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533; *Fisher, Admr., v. Louisville, etc., R. W. Co., ante*, 558.

It is true, that proof that the plaintiff owned the premises forty, or any other number of years prior to the trial, is sufficient to warrant the inference that

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she still continues the owner in the absence of evidence that she has since ceased to be such owner. But that inference is an inference of fact, and not one of law, and must be found by the trier of the facts. The court cannot draw that inference, because when the court tries the case it acts as a jury, and it is the exclusive trier of the facts.

There was no finding that the plaintiff was entitled to the possession. But counsel for appellee, in answer to this point made by appellant's counsel, refers to the conclusions of law as furnishing a sufficient finding of that fact.

The conclusions of law are as follows: "Upon the foregoing facts the court finds for the plaintiff that she is now and was the owner and entitled to possession of the real estate described in her complaint herein at the commencement of this action, and that the same has been wrongfully detained by the defendant from plaintiff; that the plaintiff is entitled to judgment in the sum of \$24.00 for the detention thereof."

Whether the foregoing statement contains any conclusion of law at all may admit of some question. Be that as it may, it contains a statement of several facts that ought to have been found in and among the special findings of fact. But it is settled law in this State that the statement of a fact or facts in the conclusions of law cannot make the special finding good which fails to find such fact or facts. *Stalcup v. Dixon*, 136 Ind. 9, and authorities cited.

Therefore, we are constrained to hold that there is no finding that the plaintiff was entitled to possession. Without such a finding the plaintiff was not entitled to judgment recovering possession. *Pittsburg, etc., R. W. Co. v. O'Brien*, 142 Ind. 218, and cases there cited; *Roots v. Beck*, 109 Ind. 472; *Wilson v. Johnson*, 145 Ind. 40.

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There are other questions discussed by counsel, but they may not arise on another trial.

. The circuit court erred in its conclusions of law.

Under the circumstances of this case as disclosed by the special findings and conclusions of law, justice will be best subserved by awarding a new trial.

The judgment is therefore reversed, with directions to award a new trial.

THE CITY OF DECATUR v. THE GRAND RAPIDS AND
INDIANA RAILROAD COMPANY ET AL.

146	577
148	69
149	112

[No. 17,896. Filed January 14, 1897.]

PRACTICE.—*Answer.*—*Demurrer.*—*Harmless Error.*—An erroneous ruling in sustaining an answer against a demurrer is harmless error if the judgment upon the merits is in favor of the plaintiff upon the issue tendered by such answer.

PLEADING.—*Municipal Corporation.*—*Condemnation of Land for Street Purposes.*—*Answer.*—*Statute Construed.*—Under section 3643 Burns' R. S. 1894 (R. S. 1881, §180), providing for appeals from proceedings for the condemnation by cities of lands for street purposes, an answer by appellant objecting to the amount of damages assessed as being too small, and demanding an increased amount of damages will be sufficient as against a demurrer.

APPEAL.—*Longhand Manuscript of Evidence.*—*When Filed.*—The longhand manuscript of the evidence must be filed with the clerk of the trial court before it is made part of the record.

SAME.—*Where Judgment is in Excess of Demand.*—*Presumption on Appeal.*—Where the amount of the judgment rendered is in excess of the demand in the pleadings, the question will be treated on appeal as if the pleading had been amended to conform to the proof.

From the Adams Circuit Court. *Affirmed.*

Mann & Beatty, for appellant

Zollars & Worden, for appellees.

HACKNEY, J.—The appellees, The Grand Rapids & Indiana Railroad Company and The Cincinnati, Rich-

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mond & Ft. Wayne Railroad Company, appealed to the lower court from an assessment of \$500.00 damages, by the authorities of the appellant, occasioned by the extension of Madison street in said city across the yards and right-of-way of the latter company, whose line was operated by the former. In the lower court a trial resulted in a finding and judgment in favor of the appellees for \$5,100.00, and from that judgment said city prosecutes this appeal.

The action of the circuit court in overruling the appellant's demurrers to the first, second, and fourth answers of the appellees, and in overruling a motion by the appellant for a new trial are assigned as error.

The first answer described the land, alleged its ownership by the appellees, and that damages had been assessed in the sum of \$500.00, when in fact said land and the appellees would be damaged in the sum of \$5,000.00. The second answer pleaded the occupancy, by the appellees, of the land in question for twenty-five years, the construction thereon of one main line and three side tracks and switches and the building of a structure from which to load and unload freight, all occupying the land to be crossed by said street.

The fourth answer alleged the vacation, by the city, of said street, at the point of crossing, to induce the location of the railway and the establishment of said yards; that the road and yards were located at the point in question by reason of the vacation of the street; that no necessity existed for the extension of the street, but that it was urged for the advancement of the values of private property, and that the damage which would accrue to the companies could not be adequately compensated.

The second and fourth answers were drawn upon the theory that the appellant should be barred of any

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right to condemn the land or to enforce an easement across it for street purposes. The finding and judgment of the court were in favor of the appellant as to the opening of the street, and the correctness of that holding is in no manner involved in this appeal. As to the appellees, in addition to the appropriation of the way, it was adjudged that they "have and recover of and from the plaintiff the sum of \$5,100.00, as hereinafter provided, as damages for and on account of the loss of storage room for cars on the strip of ground hereinbefore described, in the sum of \$5,000.00, and on account of the destruction of one loading dock, in the sum of \$100.00, and the aggregate sum of \$5,100.00."

If the rulings upon said two answers were erroneous we are unable to observe any harm resulting to the appellant therefrom. It is the settled practice that an erroneous ruling in sustaining an answer against a demurrer will not constitute reversible error if the judgment upon the merits is in favor of the plaintiff upon the issue tendered by such answer. *McComas v. Haas*, 93 Ind. 276; *State, etc., v. Julian*, 93 Ind. 292; *Foster v. Bringham*, 99 Ind. 505; *Butt v. Butt*, 118 Ind. 31; *Indianapolis, etc., R. W. Co. v. Center Tp.*, 143 Ind. 63; *Miller v. McDonald*, 139 Ind. 465; *Miller v. Rapp*, 135 Ind. 614; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571.

As to the first paragraph of answer, it is insisted that, under section 3643, Burns' R. S. 1894 (R. S. 1881, 3180), the appellees were required to "state specifically the grounds" of their "objection to the proceedings of the common council and commissioners;" and that as this was a special proceeding, where the ordinary rules of practice do not obtain, a general claim for damages was insufficient.

The statute referred to further provides that "The

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transcript of the proceedings of the common council and commissioners shall be considered as the complaint; and the written statement, to be filed by the appellant as aforesaid, shall be in the nature of an answer or demurrer. Issues of law and of fact may be formed, tried and determined as in other actions at law." The latter provision determines very clearly that an answer sufficient to present an issue in other actions at law would be sufficient in proceedings of this character, unless it may be said that under the former provision any answer objecting to the damages assessed must be so specific as to point out the particular injuries sustained and the elements of damages claimed. We do not think that this provision of the statute makes such requirement. In the appeal to the circuit court "the regularity of the proceedings of the commissioners, and the questions as to the amount of benefits or damages assessed may be tried," and the answer shall "state specifically the grounds of * * * objection." Perhaps an answer generally objecting to the condemnation and to the damages assessed would not comply with the statute, but when it is answered that the appellant is dissatisfied with the damages assessed and demands an increased amount of damages it will be sufficient as against a demurrer. Such pleading must be considered in the light of the complaint, the character of the demand, the uses to be made of the property, and the uses to which it is already subjected. When so considered, the general allegation of injury, or loss of property and the damage, will be sufficient to withstand a demurrer. If a more specific answer is desired it should be sought by the usual means of a motion to make more specific.

Appellees object to a consideration of any question depending upon the evidence, and insist that the evidence is not properly in the record.

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The original longhand manuscript of the evidence is embodied in the transcript, and its filing, prior to its incorporation in the bill of exceptions, is questioned. By order-book entry it appears that judgment was rendered January 18, 1896, on the same day a motion for a new trial was overruled, and a bill of exceptions upon that ruling was filed, the longhand manuscript was filed and a bill of exceptions containing said manuscript was filed. That part of the entry disclosing such filings is as follows: "Which said bill of exceptions are [is] here now, in open court, signed, sealed, filed and made a part of the record in this cause. Also the plaintiff files the longhand manuscript of the evidence taken in this cause by the official reporter. * * Plaintiff also tenders her bill of exceptions, number three, containing the original longhand manuscript of the evidence taken in this cause, in these words," then follows a bill of exceptions, reciting a trial on the 22d day of February, 1895, in a cause entitled in the name of this appellant against one of these appellees, and not signed until the 18th day of February, 1896. Following the bill said order-book entry of January 18, 1896, concludes as follows: "Which said bill of exceptions are [is] here in open court signed, sealed, filed and made a part of the record in this case." A previous order-book entry showed that the trial in this cause had taken place, and the finding was entered on the 4th day of November, 1895.

Passing this confusion of dates, which probably shows that the filing of the bill containing the evidence was thirty days before the bill was signed, as it disclosed upon its face, and accepting the only theory open to the appellant, that the filing of the bill was on the 18th day of February, instead of the 18th day of January, as the order-book states by mistake,

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then the filing of the bill and the longhand manuscript appear to have been concurrent acts, and it does not appear, as required by the statute, Burns' R. S. 1894, section 1476, that the manuscript was filed before it was incorporated in the bill. See *DeHart v. Board, etc.*, 143 Ind. 363; *Joseph v. Wild, ante*, 249, and cases there cited.

These cases hold that, where the question is made, it must affirmatively appear from the record that the longhand manuscript was filed before it was filed as a part of the bill of exceptions. In the present case, no file mark or certificate is given aiding the contention that the manuscript was filed prior to the filing of the bill.

Two of the causes assigned for a new trial were: "3. The damages assessed by the court are excessive. 4. The assessment of the amount of recovery is erroneous, being too large."

If the first of these causes raises any question in this case, which may well be doubted, *White v. McGrew*, 129 Ind. 83, it must depend upon the evidence, which, as we have seen, is not in the record.

Of the second of said causes, it is simply said that the recovery, \$5,100.00, was \$100.00 in excess of the demand made in the answer. In such case this court will treat the question as if the pleading had been amended to meet the amount of damages proven and found in favor of the appellee. *McKinney v. State, ex rel.*, 117 Ind. 26; *White v. Stellwagon*, 54 Ind. 186; *Webb v. Thompson*, 23 Ind. 428; *Kettry v. Thumma*, 9 Ind. App. 498.

The record presenting no available error the judgment is affirmed.

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146	583
146	672

[No. 17,971. Filed Sept. 25, 1896. Rehearing denied Jan. 14, 1897.]

PLEADING.—*Amended Complaint.*—A complaint to rescind a contract for the dissolution of a partnership on account of fraud, and for the appointment of a receiver, may be amended so as to become a complaint for damages for fraud alleged to have been perpetrated by defendant.

ELECTION OF REMEDIES.—*When Prosecution of Concurrent Remedy is Barred.*—The prosecution of one remedy must either be pending or have been prosecuted to final determination to bar or exclude another concurrent remedy for the same right.

SUPREME COURT.—*Its Decisions Binding on All Courts of the State.*—A decision of the Supreme Court is not only binding on all the inferior courts in the State, but it is binding on the Supreme Court until the decision is overruled.

From the Montgomery Circuit Court. *Reversed.*

M. E. Clodfelter, for appellant.

G. W. Paul and *H. D. Van Cleave*, for appellee.

MCCABE, J.—The errors assigned in this case are based on the action of the circuit court in overruling a demurrer to the fourth paragraph of the defendant's answer and sustaining a demurrer to the second paragraph of the plaintiff's reply. The ground of each demurrer was want of sufficient facts.

It appears, from the fourth paragraph of the answer and the record, that the complaint to which it is addressed is an amended complaint; and it seeks to recover damages for fraud alleged to have been perpetrated by the defendant, appellee, upon the appellant in a contract of dissolution of an alleged partnership between them in the hardware business.

It also appears that the original complaint, before it was amended, sought to rescind the same contract

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on account of the fraud, and asked for the appointment of a receiver. These facts are alleged at great length, and that the court refused to appoint a receiver. The answer seeks to bar the amended complaint because in the original complaint the remedy sought was a rescission of the contract on account of fraud, and in the amended complaint the remedy invoked was to recover damages on account of the alleged fraud.

In support of the ruling of the circuit court it is contended that the two remedies are inconsistent, and that one having been adopted the other cannot be resorted to, and appellee cites in support of his contention *Buscher v. Knapp, Admr.*, 107 Ind. 340. That was a case where a suit to review a judgment resulted unsuccessfully, and the defendant in the judgment sought to be reviewed appealed from the original judgment. It was there incidentally said, "that a party cannot prosecute an appeal and a suit to review, but must elect between these two remedies." Citing *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Town of Corydon*, 80 Ind. 95; *Searle v. Whipperman*, 79 Ind. 424; *Dunkle v. Elston*, 71 Ind. 585.

Another case cited by counsel is the recent case of *American Furniture Co. v. Town of Batesville*, 139 Ind. 77, where it is said: "If there are concurring effectual remedies, the choice and uninterrupted prosecution of one excludes the other." To the same effect are all the cases, namely, the prosecution of one remedy must either be pending or have been prosecuted to final determination to bar or exclude another concurrent remedy for the same right.

The amendment of the complaint superseded the original complaint. Therefore, the remedy invoked therein is not being prosecuted to determination. The exact question here involved was decided adversely to

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the contention of appellee in *Nysecander v. Lowman*, 124 Ind. 584, except that the appointment of a receiver was not asked for in that case. The amended complaint before us asked the appointment of a receiver.

The refusal to appoint a receiver under it was a mere interlocutory order, a mere incident to the main case, and was not an adjudication on the merits of the remedy invoked in the original complaint. *Naylor v. Sidener*, 106 Ind. 179. The fourth paragraph of the answer, therefore, did not state facts sufficient to constitute a defense to the amended complaint.

The circuit court erred in overruling the demurrer to the fourth paragraph of the answer. We need not, and do not consider the sufficiency of the second paragraph of the reply, as it was addressed to the fourth paragraph of the answer, which we have held bad.

The appellee has assigned cross-errors, but it does not appear when that was done. Rule 4 of this court requires cross-errors to be assigned within sixty days after the submission of the cause. For this reason we do not consider the cross-errors.

The judgment is reversed, with instructions to sustain the demurrer to the fourth paragraph of the answer.

ON PETITION FOR REHEARING.

MCCABE, J.—In deference to the earnest appeal of appellee's counsel to reexamine the question decided in the original opinion, we have carefully investigated it again.

While counsel have cited an imposing array of cases, seemingly in conflict with the conclusion reached in the original opinion, yet they have studiously avoided mentioning the previous decision of this court on which the original opinion herein is founded.

When this court has once decided a question of law

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that decision, when the question arises again, is not only binding on all the inferior courts in the State, but it is binding on this court also until that case is overruled. The case that rules this case is *Nysecwander v. Lowman*, 124 Ind. 584.

In that case, like this, the action was brought to rescind a contract for fraud; afterwards the complaint was so amended as to make it a complaint to recover damages for the fraud. The answer set up the original complaint as a conclusive election of remedies in bar of the amended complaint. But it was held that such election to be a bar must have been prosecuted to judgment.

A long list of adjudications is cited by counsel, decided in other jurisdictions, apparently establishing a different rule. We are asked to follow those cases without a word of explanation as to how we are to escape the force of our own previous decision above referred to. Those cases are *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618; *Wachsmuth v. Sims*, 32 S. W. (Tex. App.) 821; *Nat. Bank of Illinois v. First Nat. Bank of Emporia*, 57 Kan. 115, 45 Pac. 79; *First Nat. Bank of Chadron v. McKinney*, 47 Neb. 149, 66 N. W. 280.

But our case in 124 Ind. is supported on the point in question by an extensive citation of decisions, both in this country and England, and those decisions are directly in point. The facts in the cases cited by appellee's counsel as supporting the contrary rule, or at least so many of them as appear at all to be in point, are just the reverse of the facts in this case or those in *Nysecwander v. Lowman*, *supra*, and cases therein cited. That is, in the cases cited by appellee the first suit was brought to recover damages for the fraud perpetrated in the procurement of the contract. After abandoning such suit another suit was brought seeking a rescission of the same contract on account of the same

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fraud. But in the case now before us, and the one decided in 124 Ind., the suit for rescission was brought first, which was abandoned in the amended complaint and instead a complaint for damages on account of the same fraud was substituted.

It is true, in such a case, the injured party has a choice of either of the two remedies mentioned, but it does not necessarily follow that a mere choice of one by bare commencement of proceedings under it, without prosecuting it to a conclusion, precludes a resort to the other. Nor does it follow that because such preclusion does not arise in all cases that it may not arise in some cases. The facts of the cases to which appellee's counsel have referred us, are either directly opposite to the facts in the case now before us, or are of such a character as to make the rule laid down in one of them applicable, the same as it is applicable to the case now before us. That rule is stated in *Nat. Bank of Illinois v. First Nat. Bank of Emporia, supra*, and is stated thus: "‘A man may not take contradictory positions, and where he has the right to choose one of two methods of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.’”

Now how does the choice of the remedy of rescission involve the negation or repudiation of the remedy of a suit for damages for the fraud? No one will deny the right to abandon a suit for rescission. Its abandonment involves the affirmation of the contract. Then if the plaintiff may abandon it and thereby affirm the contract, that is all he does when he sues for the damages caused by the fraud in the procurement of the

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contract. *Nysecander v. Lowman*, *supra*, and cases there cited, namely: *Lenox v. Fuller*, 39 Mich. 268; *Warren v. Cole*, 15 Mich. 264; *Kraus v. Thompson*, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182; *Newnham v. Stevenson*, 10 C. B. 712. See also note to *Fowler v. Bowery Savings Bank*, 10 Am. St. 487-494, 21 N. E. 172.

It is thoroughly settled in this State, and everywhere under our system of jurisprudence, that a suit for damages on account of the fraud is a ratification or affirmation of the contract. *Johnson, Admr., v. Culver, Admx.*, 116 Ind. 278; *Home Ins. Co. v. Howard*, 111 Ind. 544; *O'Donald v. Constant*, 82 Ind. 212; *St. John v. Hendrickson*, 81 Ind. 350; *Union Central Life Ins. Co. v. Schidler*, 130 Ind. 214.

Therefore, there is much reason in holding, as the cases cited by appellee's counsel do, that an action begun to recover damages resulting from the fraud in procuring the contract is so inconsistent with a subsequent action to rescind the contract for the same fraud, that it cannot be maintained, even though the first action was abandoned before judgment. When the contract is affirmed and ratified by the injured party by such action, it then becomes binding on him and is no longer voidable, and hence, he cannot afterwards maintain a suit to rescind it. If the commencement of the suit for damages resulting from the fraud amounts to a ratification and affirmation of the contract, as we have seen it does, then there is much reason for holding the plaintiff precluded from the remedy of rescission without showing that the first suit was prosecuted to final judgment. Not so, however, if the first suit is for rescission. Its commencement is nothing more than a bare choice of remedies. Its commencement and abandonment before final judgment are not inconsistent with the continued subsistence of the contract, or a subsequent suit affirming

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such contract. There may be cases in other jurisdictions establishing a different rule, making the commencement of either suit first a conclusive choice of remedies without prosecution to final judgment. But we are of opinion that the better rule is that established in this State, and we adhere to it.

All we mean to hold as to the point now under consideration is, that the cases cited by appellee are not necessarily inconsistent with the conclusions we have reached, and if they were our own previous cases would and ought to control this case, supported as it is by both reason and authority.

Petition overruled.

MOSS ET AL. v. JENKINS ET AL.

[No. 18,021. Filed January 14, 1897.]

QUIETING TITLE.—*Lands Exempt From Sale on Execution.—When Action Must be Commenced.*—A purchaser of real estate which the vendor could have claimed as exempt from sale on execution, may maintain an action to quiet the title to such real estate if the same is commenced before the sheriff's sale. *p. 592.*

EXEMPTION OF HOUSEHOLDER.—*May be Waived.—Statutes Construed.*—Under section 715, Burns' R. S. 1894, providing that property not exceeding \$600 in value, owned by a resident householder shall be exempt from sale on execution, construed with sections 725 and 726, Burns' R. S. 1894, providing that before a debtor shall receive the benefit of the exemption he shall make out and deliver to the officer holding the execution a schedule of all his property, the rights of exemption granted to the debtor is a personal privilege which he may waive or claim at his election, and a failure to claim the exemption before sale is a waiver of such right. *p. 593.*

SAME.—*Judgment, or Execution in the Hands of an Officer a Lien Unless Debtor Claims Exemption.*—The fact that the value of the property of a judgment debtor is less than \$600 does not relieve such property from the lien of the judgment, or an execution in the hands of an officer. *pp. 594-596.*

SAME.—*Action Against Officer for Selling Property Exempt from Execution.—Defense.*—An officer who is sued for a failure to levy an

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execution issued on a judgment upon contract may defend on the ground that the debtor was a resident householder and his property did not exceed in value the amount allowed by law as exempt from execution, the presumption being that the debtor would have claimed his exemption before sale; but if the officer makes the levy he is not liable therefor to the execution debtor unless such debtor regularly claims his exemption before the sale is made *p. 597.*

SAME.—*Property Set Off by Officer to Householder is Free From Lien.*—After property has been set off by the sheriff, under the exemption law provided by statute, as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment. *p. 597.*

From the Hamilton Circuit Court. *Reversed.*

Roberts & Vestal, for appellants.

Christian & Christian, for appellees.

MONKS, J.—Appellees brought this action against appellants to quiet their title to certain real estate. The cause was tried by the court, and upon request of the parties a special finding of facts was made and conclusions of law stated thereon, to each of which appellants severally excepted. Judgment was rendered in favor of appellees, quieting their title to the real estate in controversy.

Appellants assign as error that the court below erred in each of its conclusions of law.

It appears, from the special finding, that one Vestal recovered a judgment on contract against Alexander Castor before a justice of the peace. Afterwards an execution was issued on said judgment and returned by a constable indorsed "no property found." That afterwards, on the 25th day of May, 1889, a transcript of said judgment, including said constable's return, was filed in the office of the clerk of the Hamilton Circuit Court, and was duly recorded in the proper order-book and docketed in the proper judgment docket of said court. Afterwards, on June 13, 1895, the proper

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steps were taken and an execution was issued on said judgment to the sheriff of said Hamilton county. The sheriff demanded property of said Castor whereon to levy said execution, but he did not deliver or point out any property for the sheriff to levy upon. Afterwards the sheriff levied said execution upon the property in controversy, and after taking proper steps by giving notice, etc., sold the same to appellant, Moss, for the amount of said judgment, interest and cost, and delivered to said appellant a sheriff's certificate therefor; that at said time appellant, Moss, had no knowledge of the amount of property which Castor, the judgment debtor, then owned, or the amount he had owned at any time since the rendition of said judgment; that said Castor, nor any one in his behalf, had ever filed a schedule claiming said real estate nor any property as exempt from either of the executions issued on said judgment. That said Castor was the owner of the real estate in controversy on and before the 15th day of August, 1889; that on said day he sold and conveyed said real estate to one William H. Craig, who paid full value therefor, and that said Craig sold and conveyed said real estate to appellees on October 29, 1890, who paid full value therefor; that each of said deeds was properly recorded within forty-five days after they were executed; that when said judgment was rendered, and at all times since, said Castor has been a resident householder of Hamilton county, Indiana; that on the day said judgment was rendered and ever since said Castor has not owned, possessed or acquired property of the value of \$600.00, including the property in controversy.

Appellants insist that as Castor and no one in his behalf claimed the property in controversy as exempt from execution before sale that the sale was valid.

Appellees claim that as Castor had less than

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\$600.00 worth of property neither the judgment nor execution was a lien on the property, and the same was exempt and no duty rested on Castor, or any one else, to claim said property as exempt before said sale, and such sale was invalid.

This court has held that the purchaser of real estate in a case like this may maintain an action to quiet the title to such real estate if the same is commenced before the sheriff's sale. *King v. Easton*, 135 Ind. 353; *Dumbould v. Rowley*, 113 Ind. 353; *Barnard v. Brown*, 112 Ind. 53.

We have not been cited to any case, nor do we know of any in this State, where it has been held that such action can be maintained if brought after the sheriff's sale.

Section 22 of the bill of rights in the constitution, being section 67, Burns' R. S. 1894 (67, R. S. 1881), provides that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted."

This section of the constitution is not self executing, but requires the action of the legislature to carry its provisions into effect. *Green v. Aker*, 11 Ind. 223.

In section 715, Burns' R. S. 1894 (703, R. S. 1881, Acts 1879, p. 127, in force May 31, 1879), it is provided that "An amount of property not exceeding in value \$600.00, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act."

The legislature did not, however, enact a law absolutely exempting property of the value of \$600.00, but provided, by section 725, Burns' R. S. 1894 (713, R. S.

1881, Acts 1879, p. 129, in force May 31, 1879), that "Before a debtor shall receive the benefit of the exemption provided by this act, he shall make out and deliver to the officer holding the execution a schedule of all his property, as now provided by law, in case an exemption from sale on execution is claimed."

Section 726, Burns' R. S. 1894 (714, R. S. 1881, Acts 1861, p. 119, in force July 5, 1861), made provision for the schedule of the debtor's property, referred to in section 725 (713), *supra*, as follows:

"Before any person shall be entitled to the benefit of the provisions of the above recited act, he shall make out and deliver to the sheriff or other officer having the writ, an inventory of all of his or her real estate, within or without this state, money on hand or on deposit within or without this state, rights, credits, and choses in action, and all personal property of every description whatever belonging to him or in which he had any interest at the date of the issuing of the writ, and make and subscribe an affidavit to the same that such inventory contains a full and true account of all such property as required in this act to be set out in the said inventory, had or held by him at the time such writ was issued; and if any of such property has been disposed of by him since the issuing of the writ, such affidavit shall show that fact, and how the same has been disposed of, and what disposition he has made of the proceeds; and until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution defendant as exempt from execution."

Under this and prior acts with like provisions, this court has held that exemption laws are to be liberally construed, yet the right of exemption granted to the debtor is a personal privilege which he may waive or

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claim at his election. A failure to claim the exemption before sale, is deemed a waiver of such right. *Pate v. Swann*, 7 Blackf. 500; *State, ex rel. v. Melogue*, 9 Ind. 196; *Eltzroth v. Webster*, 15 Ind. 21; *Godman v. Smith*, 17 Ind. 152; *Sullivan v. Winslow*, 22 Ind. 153; *Finley v. Sly*, 44 Ind. 266; *Gregory v. Latchem*, 53 Ind. 449; *Terrell v. State, ex rel.*, 66 Ind. 570; *Williams v. Osbon*, 75 Ind. 280; *Over v. Shannon*, 75 Ind. 352; *Boesker v. Pickett*, 81 Ind. 554; *Haas v. Shaw*, 91 Ind. 384; *State, ex rel. v. Reed*, 94 Ind. 103; *Berry v. Nichols*, 96 Ind. 287; *Guerin v. Kraner*, 97 Ind. 533; *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. 45, 3 L. R. A. 383; *Graves v. Hinkle*, 120 Ind. 157; *Coppage, Admr., v. Gregg*, 1 Ind. App. 112; *Wagner v. Barden*, 13 Ind. App. 571.

Section 725 (713), *supra*, which was passed in 1879, and section 726 (714), *supra*, which was enacted in 1861, require of the execution debtor, as a condition precedent to his right to have the sheriff set off to him property as exempt, etc., that he furnish the officer holding the execution a verified inventory of all the property he owns or has any interest in anywhere in the world. Until this is done the execution debtor is not entitled to his exemption, and the sheriff cannot set apart any property to him as exempt from execution. *Gregory v. Latchem, supra*; *Over v. Shannon, supra*; *Graham v. Crockett*, 18 Ind. 119; *Astley v. Capron*, 89 Ind. 167.

Appellee insists, however, that when the execution debtor has less than \$600.00 worth of property that neither the judgment nor execution is a lien on the same. The statutes in this State declare when and upon what property judgments and executions are liens.

Section 694, Burns' R. S. 1894 (682, R. S. 1881), provides that an execution against the property of the

judgment debtor shall require the sheriff to satisfy the judgment out of the property of the debtor subject to execution.

Section 617, Burns' R. S. 1894 (608, R. S. 1881, Acts 1881, p. 348, section 601), provides that all judgments of the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, subject to execution in the county where the judgment is rendered.

To determine what real estate is subject to sale on execution we turn to section 764, Burns' R. S. 1894 (752, R. S. 1881, Acts 1881, p. 347, section 600), where it is provided that "the following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same and for whose use the same is holden, viz:

"*First.* All lands of the judgment debtor, whether in possession, remainder, or reversion.

"*Second.* Lands fraudulently conveyed with intent to delay or defraud creditors.

"*Third.* All rights of redeeming mortgaged lands; also all lands held by virtue of any land-office certificate.

"*Fourth.* Lands, or any estate or interest therein, holden by any one in trust for or to the use of another.

"*Fifth.* All chattels real of the judgment debtor."

The statute also declares what personal property of a debtor an execution is a lien upon, and the time when the said lien takes effect.

Section 698, Burns' R. S. 1894 (686, R. S. 1881), provides that "When an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer shall be bound from the time of the delivery; but if there be several executions, whether issued out of a court of record or by a justice

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of the peace, against the same defendant in the hands of different officers, that execution, without regard to the time of its delivery, under which the first levy is made shall have the preference, and all liens created by the prior delivery of any other execution shall be divested in favor of the execution first levied."

This court has held under this section, that an execution is a lien upon the execution debtor's property from the time of its delivery to the officer. *Willson v. Binford*, 54 Ind. 569; *McCrisaken v. Osweiler*, 70 Ind. 131; *Lindley v. Kelley*, 42 Ind. 294; *Cones v. Wilson*, 14 Ind. 465; *Johnson v. M'Lane*, 7 Blackf. 501; *Vandibur v. Love*, 10 Ind. 54.

It follows from the foregoing sections of the statutes and the cases cited that all property of an execution debtor is *prima facie* subject to execution. *State v. Mclogue, supra*; *Godman v. Smith, supra*; *Terrell v. State, supra*; *Bueskir v. Pickett, supra*.

In *Terrell v. State, supra*, which was an action on a sheriff's official bond for damages for failure to levy an execution issued on a judgment upon a contract, this court, on p. 575, said: "Construing together all the statutory provisions bearing upon the seizure and sale of property upon execution, the inference is obvious, that all the property of execution defendants in this State is considered as *prima facie* subject to execution, and that it is the duty of the officer holding an execution to proceed until some claim for exemption is lawfully interposed."

In such case, however, the officer may defeat a recovery by showing that the debtor was a resident householder and his property did not exceed in value the amount allowed by law as exempt from execution. *State, ex rel., v. Harper*, 120 Ind. 23; *Dick v. Hitt*, 82 Ind. 92.

The presumption being that the execution debtor

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will claim the benefit of the exemption law. This presumption, which may not be conclusive, is predicated upon the theory that every man will do that which is to his own interest. *Dick v. Hitt, supra.*

This principle has been approved in other cases. *Williams v. Osborne*, 95 Ind. 347; *Simpkins v. Smith*, 94 Ind. 470; *Iles v. Watson*, 76 Ind. 359; *Williams v. Osbon, supra*; *Campbell v. Gould*, 17 Ind. 133; *Bozell v. Hauser*, 9 Ind. 522.

While it is true that where an officer sued for a failure to levy an execution issued on a judgment upon contract, makes at least a *prima facie* defense by showing that the execution debtor was a resident householder, and his property did not exceed the amount allowed by law as exempt from execution, yet if he makes a levy upon such property he is not liable therefor to the execution debtor, unless before the sale of such property on the execution, the execution debtor claims his exemption substantially in the manner required by the statute and the same is refused by the officer. *Huseman v. Sims*, 104 Ind. 317; *Boesker v. Pickett, supra*; *Finley v. Sly, supra*; *Douch v. Rahner*, 61 Ind. 64; *State v. Read, supra*; *Over v. Shannon*, 91 Ind. 99; *Chatien v. Snider*, 126 Ind. 387; *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643, and note pp. 645-653; 1 Freeman on Ex., section 215a; Waples' Homestead and Exemption, p. 781.

After property has been set off by the sheriff under the exemption law as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment. *Hall v. Hough*, 24 Ind. 273; *Vandibur v. Love, supra*; *Ray v. Yarndel*, 118 Ind. 112.

The right of the purchaser of real estate, which the vendor could have claimed as exempt from sale on execution, to maintain an action commenced before the execution sale to quiet his title to such real estate

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as against such lien rests upon equitable principles, and is not declared by the statute. *Barnard v. Brown, supra.*

The execution debtor may, after he has sold property which was subject to the lien of an execution, include it in his schedule and claim it as exempt. *Godman v. Smith, supra; Vandibur v. Love, supra.*

There is no hardship to anyone, therefore, in allowing the purchaser of said property to maintain an action to enforce his vendor's right to claim such property as exempt in order to protect his own title thereto. We think this doctrine is sound, and is sustained by the principles of equity.

While it may be regarded as settled in this State that the purchaser of property which is subject to a judgment or execution lien may maintain such action when brought before the sale thereof by the sheriff, we do not think the doctrine should be further extended, as is sought in this case.

It is clear that if the sale to appellant Moss had been made by the sheriff before Castor conveyed the real estate to Craig, and no claim had been made by Castor before the sheriff's sale for the exemption of such property, that such sale would have been valid.

The execution debtor, as we have seen, is required to claim his exemption before the sale by the sheriff, and for the same reason his vendee must claim his vendor's right of exemption by commencing his action before the sheriff's sale. His right in this respect can be no greater than his vendor's, under whom he claims.

To hold otherwise would cast suspicion upon every title that depended upon a sale on execution, unless enough time had elapsed since the sale to give a title under some statute of limitations. For if such an action can be maintained if commenced one day after

the sale, it can be sustained if commenced at any time within the period of the statute of limitations. To such a doctrine we cannot yield our assent.

There may be language in some of the cases decided by this court which seems to sustain the trial court in its conclusions of law, but in those cases the question here presented was not before the court and was not considered.

Although the conclusion we have reached in this case may not be in harmony with the inference which might be drawn from the language used in the cases referred to, it is not in conflict with the final judgment of this court in any of those cases. Neither is our conclusion in this case in conflict with the doctrine enunciated in many of our cases where it was sought to reach property of the husband, alleged to have been conveyed to his wife or others to defraud creditors.

In such cases the court has correctly held that when the debtor who is a resident householder, has property worth not exceeding \$600.00, fraudulently conveys or transfers the same without consideration to defraud his creditors, that such property cannot be reached for the reason that the debtor could successfully claim the same as exempt from execution if the indebtedness were reduced to judgment. Therefore, his creditors had no right to complain, if he, before judgment, had placed his property beyond the reach of any judgment or execution.

It follows that the court erred in its conclusions of law.

Judgment reversed, with instructions to the court below to restate its conclusions of law in accordance with this opinion and render judgment in favor of appellants.

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THE RICHMOND GAS COMPANY v. BAKER.

[No. 17,156. Filed January 26, 1897.]

NEGLIGENCE.—Gas Company.—Defective Pipes.—Explosion.—A gas company which uses a cracked and defective elbow in connecting its conducting pipe with the plumbing of a dwelling house, which elbow the company is repeatedly called upon to repair so as to prevent the leaking of gas, and which it fails to repair by the removal of the elbow or effectually closing the crack known to exist, is liable for injuries sustained by reason of the explosion of the escaping gas, in the absence of contributory negligence on the part of the injured party. *pp. 601-605.*

SAME. — Gas Company. — Explosion. — Contributory Negligence. —Where a gas company has been notified by the occupants of a dwelling house, of a defect in an elbow connecting the conducting pipe with the plumbing of the house, and sends its agent to repair the same, and such agent after professing to have made the necessary repairs informs the family occupying the house that all is safe, and assures them that the odor of gas is from a gas post on the street, a member of the family remaining in the house, who is injured by an explosion of the gas, is not thereby guilty of contributory negligence. *p. 605.*

DAMAGES.—Personal Injuries.—Shortening of Life.—In an action for damages for personal injuries the fact that the life of the injured person has been shortened cannot be taken into consideration in the assessment of damages, except for the purpose of showing the extent of the injuries complained of. *pp. 608-610.*

From the Wayne Circuit Court. *Reversed.*

T. J. Study, for appellant.

Jackson & Starr, for appellee.

HOWARD, J.—This was an action for damages, brought by appellee for injuries alleged to have been received by her by reason of an explosion of artificial gas, caused by the negligence of appellant. The questions arising on the appeal relate chiefly to the allegations and proof made as to negligence on the part of the company, and contributory negligence on the part

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of the appellee. As bearing upon these questions, the briefs of counsel are almost exclusively taken up with a discussion of the sufficiency of the complaint and the correctness of the court's action in giving and refusing instructions.

The complaint is in three paragraphs. The first paragraph counts on negligence of the company in the laying of its mains in the street and the making of connections of the same with the house pipe, whereby, as alleged, gas escaped from the mains into the house. The second paragraph counts on negligence in repairing leaks in the house pipe after defects therein had been discovered and made known to the company and the repair had been undertaken, but not properly made by its agents, thus causing the gas to escape through the house. The third paragraph counts on a defective joint of pipe which the company used to connect its street mains with the house pipe, from which defective joint the gas leaked into the house. The allegations in each paragraph seem to be sufficient, including allegations as to the appellee's freedom from contributory negligence, although as to the latter allegations the complaint was perhaps subject to a motion to make more specific and certain.

With their general verdict the jury returned answers to interrogatories submitted to them, and from these answers, as also from the evidence, it appears: That the appellee is an aged woman, living in the family of her grandson, Thomas Crabb; and that, on December 18, 1892, the appellant began to furnish gas to the house of Mr. Crabb, having entered into a contract with him for that purpose. The gas was received by a pipe passing through the outer wall of the cellar, in which a meter was placed by the company. Mr. Crabb's family consisted of himself, his wife, their child, and the appellee. He was engaged in daily

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work away from home, and his wife conducted a small store on the ground floor and in the front part of the house. The house had already been properly piped for gas by Mr. Crabb, who had also extended a pipe into the cellar ready to be attached by the company to its gas main in the street; and the company did so attach the house pipe to its main by a connecting pipe. A short time after the attachments were so made and the gas began to be furnished, it was noticed by the family that gas was escaping into the store and other rooms of the house. Before notifying appellant of the leak, a man was sent into the cellar to examine the pipe, and he found that the gas was leaking through a part of the pipe put in by the company, consisting of a cracked elbow attached to the house pipe. The leak was temporarily closed by candle grease. Very soon, however, the gas again began to escape and to permeate the house, and notice was sent to the gas company to repair the leak. In response to this request, the company sent an employe, named Brannon, who applied what is known as "plumber's cement" to the cracked elbow, and thus, for the time, stopped the flow of gas. The jury find that Brannon did not know how to apply the cement properly, and soon after his work the gas again began to escape. The explosion occurred on Wednesday evening, January 18, 1893, just one month after the gas had been introduced into the house. On the Sunday morning preceding, the gas was noticed in dangerous quantities, and Mr. Crabb shut it off from the street, to stop the flow into the house. On Monday afternoon he again turned on the gas. At the time when the house pipes were attached to the street mains to supply the house with gas, the company placed an appliance, being a stop-cock with a wrench ready for use, between the wall of the building and the meter, for the purpose of cut-

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ting off the gas whenever it should be desired to do so. The manner of using this appliance was at the time pointed out to Mr. Crabb, and he understood it, and had no trouble in shutting off the gas on Sunday morning and turning it on again on Monday afternoon. When the gas was so shut off at the stopcock, the flow from the mains ceased entirely, and there was no escape of gas into the house. After the gas was turned on by Mr. Crabb on Monday afternoon, it soon began to escape again into the rooms, and notice was again sent to the company that afternoon, to come and repair the pipe. On the next, or Tuesday, afternoon, being the day before the explosion, the company sent the same employe, Brannon, to attend to the leak. After such examination and repair as he made, he turned on the gas and informed Mrs. Crabb that it was now all right; and it appears that on the same evening this information was communicated by her to appellee. The gas, however, still continued to escape from the cracked elbow into the house, and in greater quantities, until the evening of the next day, when it exploded.

The appellee had lived for some time with her grandson and as a member of his family. She had been there continuously during the month from the day when the gas was admitted into the house until it exploded and wrecked the house, on the day of her injury. During all the time that there had been the smell of escaping gas, she had been in and about all the rooms of the house and had ample opportunity of detecting the odor. Except that her hearing was not good, she had the full use of all her faculties and her senses, including the sense of smell, and was a person of ordinary intelligence and understanding. During the day of the explosion and the days immediately prior thereto, the odor of escaping gas was plainly dis-

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cernible in all parts of the house; and Mr. Crabb and his wife were told by persons visiting them that the gas then escaping into the house was dangerous. At the same time the appellee was in daily communication with Mr. and Mrs. Crabb, and was in and about all the rooms of the house, including the store in which the explosion took place. The jury further find that on the day of the explosion, and on the Sunday, Monday and Tuesday preceding, the odor of gas was plainly discernible to any one using ordinary diligence. The cellar did not extend under the storeroom; but there was a shallow place thereunder, between the ground and the floor, separated from the cellar by a wall. Through this wall there was an aperture by which the gas, escaping from the cracked elbow, entered into the space beneath the floor of the storeroom, and thence penetrated above. At one end of the store was a closet, and into this, the gas was collected in an excessive amount, and from this point the explosion originated. Mrs. Crabb had sold a cigar to a customer and gave him a match to light it. The appellee was at the time present with Mrs. Crabb. The customer stood close to the closet when he struck the match, and immediately the gas took fire and exploded.

We do not understand that the able and ingenious counsel for appellant contends seriously that these facts do not show negligence on the part of the company. The company was supplying the house of Thomas Crabb with artificial gas, a penetrating, elusive and explosive material, and hence one that was at any moment liable to become dangerous unless carefully guarded. The company therefore owed a duty to all persons who might be injured by the gas, to use ordinary and adequate care in delivering the substance into the residence in question. Even if the company did not know of the cracked elbow at the time it was

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attached to and made a part of the conducting pipe from the street mains to the house, it did know of this defect after the repeated calls for its repair, but still wholly failed to make the repair by removing the cracked elbow or by effectually closing the crack known to exist in it. Moreover, the company's agent, after professing to have made a final examination, turned on the gas and assured the family that everything was now all right and that they might therefore rest secure, notwithstanding the strong odor of gas, which he told them must come from the lamp post on the street. No refinements of reasoning can show that such conduct was not culpable negligence.

But counsel for appellant does earnestly contend that the facts found by the jury and shown in the evidence, disclose contributory negligence on the part of the appellee, or, at least, that she has not established her freedom from such contributory negligence.

In this, also, we are unable to agree with counsel. Because the gas had penetrated the various parts of the house in dangerous quantities it does not follow that the occupants were aware of the full extent of their danger. They had good reason to rely upon the superior knowledge of the gas company and of its agent who had made the connections of its mains with the house, and who had afterwards assumed charge of making repair of the connecting pipes, and then assured the family that all was now safe and that they need not be alarmed about the odor, which they were assured came from the gas post on the street corner. The company could not thus lull the members of the family into a belief in their security, and then when injury came turn on the family and charge them with negligence in relying on the assurance of safety so given by the company itself. The company had assumed the responsibility of making the repairs or

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changes in the piping necessary for the safe delivery of gas to the house, and thereafter continued to deliver the gas with full knowledge of all the conditions, including a knowledge of the family's reliance upon its assurance of safety. *Jamieson v. Indiana Natural Gas, etc., Co.* 128 Ind. 555; *Mississinewa Mining Co. v. Patton*, 129 Ind. 472; *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350, 32 L. R. A. 146; and see, *Empire, etc., Machinery Co. v. Brady*, 164 Ill. 58, 45 N. E. 486.

Moreover, even if it could be shown, as appellant argues, that Thomas Crabb or his wife were negligent, such negligence could not be imputed to appellee; she could be charged only with any negligence of which she had herself been guilty. *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Miller v. Louisville, etc., R. W. Co.*, 128 Ind. 97; *Lake Shore, etc., R. W. Co. v. McIntosh*, 140 Ind. 261. Appellee, in common with the rest of the family, had not only the assurance of the company that there was no danger to be apprehended from the gas, but this assurance was fortified in her mind by the confidence of Mr. and Mrs. Crabb. They remained quietly attending to their duties in all confidence, as she could see. They suffered their child to be with them about the house. Mrs. Crabb was attending to the store and Mr. Crabb was sitting quietly at the stove reading at the moment of the explosion. The appellee could not possibly have any grounds for apprehension of danger under these circumstances, and could not be required to leave her home in midwinter to avoid the presence of the smell of gas, which the words of the company, as also the conduct of the family, had assured her was altogether free from peril, whatever might be the disagreeable odor of the gas in the house. She had been lulled into a feeling of security.

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The condition of the evidence and the findings of the jury thus disclosed, showing, as they do, negligence on the part of the appellant and freedom from negligence on the part of the appellee, make it quite unnecessary to follow counsel in a great part of what is said as to instructions given and refused by the court. The instructions given by the court, in so far as they bear upon the question of negligence, were correct as applied to the evidence, as was also the action of the court in refusing instructions asked for by appellant in relation to the same matter.

Upon the subject of damages the court gave to the jury two instructions, the first of which is admitted to be correct, and the second of which is complained of by appellant as being erroneous. The two instructions are as follows:

“No. 15. If you find a verdict for the plaintiff, you should award her a sum sufficient to fairly compensate her for all damages, if any, that it is shown by a fair preponderance of the evidence she has sustained. In estimating such damages, you should consider the nature and extent of her physical injuries, if any, whether permanent or otherwise, the effect produced thereby, and the probable effect that such injuries will directly produce, if any, upon her general health, and all physical pain and suffering occasioned thereby; expenses incurred for medical attention, if any, shown by the evidence. And if you find, from the evidence, that she has sustained any permanent disability, having considered the nature of the same, you may award her such prospective damages on account thereof as in your opinion the evidence may warrant you in believing she will sustain, if any, as the direct result thereof in the future. And you have the right in fixing her damages, to consider her present age and the probable duration of her life.

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"No. 16. If, as a direct result of the injuries, if any received by the plaintiff, her expectancy of life has been shortened, this circumstance may be taken into consideration by the jury, should they find a verdict in her favor, in estimating the damages, if any, that they may award to her, and on this point the jury may consider all facts, proved by a fair preponderance of the evidence, as to the plaintiff's physical condition, health, vigor, activity, and the daily work done by her prior to the said explosion."

The first charge above given is full and complete, covering every element of damage suggested by the evidence, unless it should be damages for the shortening of life, as referred to in the second charge. It is as to this question that counsel differ. Counsel for appellant contend that instruction number 16 is erroneous for the reason that this is a common law action, and the common law does not admit of compensation in money for the taking of human life or the shortening of its duration; that if appellee were injured by the wrong of appellant and without her own fault, the damages provided for in instruction number 15 were therefore all that could be allowed her. And counsel cite 3 Lawson's Rights, R. & P., section 1016; Cooley on Torts, 27, 28; 2 Thompson Neg., 1272, 1273, sections 72, 73; *Conn., etc., Ins. Co. v. New York, etc., R. R. Co.*, 25 Conn. 265; *Hyatt v. Adams*, 16 Mich. 179. See also *Jackson v. Pittsburgh, etc., R. W. Co.*, 140 Ind. 241.

Counsel for appellee, on the other hand, earnestly contend that there may be a pecuniary compensation for the taking of human life, apart from the question of damage or loss sustained by any one thereby. And they cite *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138; *Ohio, etc., R. R. Co. v. Hecht*, 115 Ind. 443; *Hecht v. Ohio, etc., R. W. Co.*, 132 Ind. 507; *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471; *Magee v. City of Troy*, 1 N. Y.

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Supp. 24; *Toledo, etc., R. W. Co. v. Baddeley*, 54 Ill. 19; *Sabine, etc., R. W. Co. v. Ewing*, 7 Tex. Civ. App. 8, 26 S. W. 638; *Cooper v. St. Paul City R. W. Co.*, 54 Minn. 379, 56 N. W. 42; *Gulf, etc., R. W. Co. v. Higby* (Tex.), 26 S. W. 737; *Cunningham v. New York, etc., R. R. Co.*, 49 Fed. 439; *Reed v. Penn. R. R. Co.*, 56 Fed. 184; *Peterson v. Chicago, etc., R. W. Co.*, 38 Minn. 511, 39 N. W. 485.

None of the cases cited by appellee, as we believe, sustain the contention of counsel. In general, these cases reach to this, that in an action for injury by the wrong of another the actual condition of the injured person as caused by the accident may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. And if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life. And if anyone else could maintain an action for the death of the injured person, it must be because the person bringing such action would be able to show pecuniary loss or damage to himself by reason of the death of such other person. Of that nature are various statutory actions authorized to be brought by, or for the benefit of persons regarded as having a pecuniary interest in the lives of others. *Lake Erie, etc., R. W. Co., v. Mugg*, 132 Ind. 168; *Louisville, etc., R. W. Co. v. Wright*, 134 Ind. 509;

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section 267, Burns' R. S. 1894 (266, R. S. 1881); section 283, Burns' R. S. 1894 (282, R. S. 1881); section 285, Burns' R. S. 1894 (284, R. S. 1881); section 7473, Burns' R. S. 1894.

If it should be contended that the instruction here objected to might be upheld as intended simply to draw the attention of the jury to the probable shortening of life as an indication of the severity of the injury and, consequently, of present and future pain, it may be answered that the instruction was evidently drawn with no such purpose in mind, but merely with the view of authorizing the jury to consider the shortening of her life as an element which of itself, simply, might be taken into account by them in awarding her damages, in case they should find in her favor. This, however, as we have seen, was unauthorized. The instruction, at best, was misleading.

Neither are we able to say, from the evidence and the answers to interrogatories, that this instruction was harmless, or that it might not have unduly influenced the verdict of \$4,600.00 in appellee's favor. Without saying that such damages were excessive for a person eighty-five years of age and injured only to the degree shown, we are yet unable to know whether the jury would have awarded damages to that amount had they not considered the shortening of appellee's expectancy of life as a legitimate element in making their award.

The judgment is reversed, with instructions to grant a new trial.

Sutherland *et al.* v. McKinney.

SUTHERLAND ET AL. v. MCKINNEY.

[No. 17,996. Filed January 26, 1897.]

INTOXICATING LIQUORS.—*License.—Remonstrance.—When Remonstrator May Not Withdraw His Name.*—Under section 9, Act of March 11, 1895, providing that, if three days before the regular session of the board of county commissioners a majority of the legal voters shall sign and file a remonstrance, the license shall not be granted, a withdrawal of one's name cannot be made after the beginning of the third day before such meeting, and a motion signed by a number of remonstrators and filed with the board of commissioners after such time, stating that they had signed the remonstrance under "mistake and misapprehension" should be overruled.

From the Washington Circuit Court. *Reversed.*

Harvey Morris, for appellants.

Mitchell & Mitchell and *Zaring & Hottel*, for appellee.

MONKS, J.—Appellants filed with the auditor of Washington county a remonstrance in writing, under section nine of an act approved March 11, 1895 (Acts 1895, p. 248), commonly known as the "Nicholson Law," against the granting of a license to appellee for the sale of intoxicating liquors under the laws of this State. The remonstrance was filed before the session of the board of commissioners and within the time fixed by said law, and was signed by a majority of the legal voters of Washington township, in which appellee desired to carry on said business.

On the fifth day of the regular session of the board of commissioners appellee filed a written motion, signed by fifty-two of the persons who had signed said remonstrance, that said board of commissioners dismiss said remonstrance as to them and that their names be stricken therefrom, stating as the reason

146	611
146	701
146	611
154	124
156	381
146	611
158	594
146	611
159	501
159	502
146	611
168	25
168	27
168	28
168	232

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therefor that they each had signed said remonstrance "under mistake and misapprehension."

This motion was overruled by the board and the application of appellee for said license was denied under said section nine. Appellee appealed said cause to the circuit court, where said motion as to said fifty-two persons was renewed and was sustained by the court, and said remonstrance was dismissed as to them. Not counting the signatures of these fifty-two persons, the remonstrance was not signed by a majority of the legal voters of said township. The trial of said cause resulted in a finding in favor of appellee and a judgment that he be granted a license, etc.

The action of the court in sustaining said motion to dismiss as to said fifty-two persons is called in question by the assignment of errors. It appears, from the record, that the trial court sustained said motion upon the ground that a remonstrant has the right to withdraw his name at any time before the cause is submitted to the board of commissioners for trial. This court has held that a remonstrant has no right to withdraw his name after the expiration of the time for filing a remonstrance. *State v. Gerhardt*, 145 Ind. 439; *Concell v. Overmeyer*, 145 Ind. 698; *White v. Prifogle*, *ante*, 64.

Appellee insists that as the motion states that the remonstrance was signed by said persons under mistake and misapprehension, they had the right to withdraw their names from the remonstrance. Whether there is any exception to the rule declared by the court in the cases cited, we need not determine in this case for the reason that the motion did not state any facts showing that the persons named signed said remonstrance "under mistake and misapprehension."

It follows that the court erred in sustaining said motion to dismiss the remonstrance.

City of Evansville *et al.* v. Miller.

The remonstrance being signed by a majority of the legal voters of said township and filed within the time limited by law, the court below had no jurisdiction or power to grant said license to appellee. *Flynn v. Taylor*, 145 Ind. 533.

It is due to the learned judge of the court below to say that this cause was tried and determined by him before the case of *State v. Gerhardt*, *supra*, and other cases under the "Nicholson Law" had been decided by this court.

Judgment reversed, with instructions to overrule said motion to dismiss the remonstrance as to said fifty-two persons, and for further proceedings not inconsistent with this opinion.

CITY OF EVANSVILLE ET AL. v. MILLER.

[No. 18,032. Filed January 26, 1897.]

146	613
155	388
156	642
146	613
160	50
146	613
168	287

MUNICIPAL CORPORATIONS.—*Power of Common Council in Declaring What Shall Constitute a Nuisance.*—A municipal corporation although authorized by its charter to declare what shall constitute a nuisance, may not declare that to be a nuisance which in fact is not.

SAME.—*Cities.*—*Invalid Ordinance.*—*Partially Burned Building Not a Nuisance.*—Under section 23 of the act governing cities having more than fifty thousand and less than one hundred thousand population as amended by section 4 of the Act of March 11, 1895, authorizing such cities to declare what shall constitute a nuisance, an ordinance declaring a partially burnt building to be a nuisance irrespective of its actual condition or location, is invalid.

From the Vanderburgh Superior Court. *Affirmed.*

G. A. Cunningham and E. Q. Lockyear, for appellants.

Gilchrist & DeBruler, for appellee.

City of Evansville *et al.* v. Miller.

JORDAN, C. J.—This action was instituted by appellee to prevent the collection of certain assessments, levied by the board of public works of the city of Evansville on certain real estate owned by appellee and situated within the city. The theory of the complaint is that this assessment of \$199.00 is void by reason of the invalidity in part of an ordinance under which the city undertook to levy said assessment. A trial resulted in a finding by the court in favor of appellee, and a judgment was awarded canceling the assessment and adjudging void the lien claimed thereunder by the city.

The facts in the record show that the appellee, Miller, in May, 1895, became the owner, by purchase, of lots 6, 7, 8 and 9, in block 7, of Goodsell's enlargement of the city of Evansville, and that the dwelling house situated on said premises at the time he became the owner thereof had been partially destroyed by fire. On June 24, 1895, the common council of that city passed an ordinance defining nuisances, etc. The first section of this ordinance provided as follows:

"Be it ordained by the common council of the city of Evansville, *That any building, shed, outhouse or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be suffered by the owner thereof to remain in such condition, after being notified by the Department of Public Works to remove, repair or rebuild the same, shall constitute a nuisance.* Any building, shed, outhouse, or structure of any kind that shall become filthy or unwholesome is hereby declared to be a nuisance."

The part assailed by the appellee as invalid is indicated by italics. Section two provides that whenever the department of public works shall have knowledge "that any nuisance such as is defined in section one of this ordinance exists in said city, it shall there-

upon make an order requiring the owner thereof to abate the same within such time as said department may fix." This section further provides for giving notice to such owner, of the order, and declares it lawful for said department to remove such buildings or structures in whole or in part by persons employed by it, or by letting such work by contract, etc. Section three contains provisions for assessing the cost of the removal of the building against the real estate in like manner as assessments of benefits are made. On July 13, 1895, the department of public works of the city, under this ordinance, made an order as follows:

"And now it is ordered by the department of public works of the city of Evansville:

"That, Whereas, the buildings situate on lots 6, 7, 8, and 9, in block 7, in Goodsell's enlargement in said city, have been partially destroyed by fire, and have been suffered by the owner thereof to remain in such condition for a period of twelve months, and by reason thereof have created a nuisance.

"Now, therefore, it is ordered by said department that the owner of said real estate abate said nuisance by the removal of the whole of said building, or so much thereof as remains unconsumed, together with all offal, dirt, debris of every kind situate thereon, on or before the 17th day of August, 1895.

"And it appearing that John A. Miller, the owner of said real estate, is a nonresident of the city of Evansville, it is ordered that he be notified of this resolution by publication in a newspaper published in said city.

"At the expiration of said time, if such owner shall not have abated such nuisance, this department will proceed to abate the same by the removal of such structure, and by such other means as may be deemed necessary."

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After the time designated in this order for the removal of the building by appellee, the board of public works made the following order for its removal:

"It is hereby ordered and directed by the board of public works of the city of Evansville that the clerk advertise for bids for removing all that part of the 'Jordan Giles' residence on Washington avenue, above the stone foundation, stacking all good lumber and brick on the premises and removing all rubbish and burnt lumber from the premises."

It was admitted by the parties in the lower court that the proceedings by the city in the matter in controversy were regular and consistent with the requirements of the ordinance, and that the assessment to the amount of \$199.00 was made against the real estate of appellee as alleged in the complaint, and that appellant, Schwacke, had complied with his contract in removing the partially destroyed building from the premises in question.

It is clear, we think, that the city of Evansville, through her duly constituted authorities, in ordering the removal of this partially destroyed building, and in assessing the expense of such work upon appellee's real estate, proceeded under that part of section one of the ordinance which declares "that any building, etc., that shall be partially destroyed by fire, etc., and suffered by the owner to remain in such condition after being notified, etc., to remove, repair, etc., shall constitute a nuisance." The controlling question, therefore, for our decision is that which relates to the validity of this portion of the ordinance, for, as this is the basis upon which the city's proceedings rest, its invalidity must necessarily render them inoperative and void. Counsel for appellee deny that the common council of the city of Evansville has, either expressly or impliedly, the power to declare by ordinance that

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a building partially destroyed and suffered to remain in that condition, shall, by reason of such facts alone, necessarily constitute a nuisance. It will be seen that the ordinance in dispute ordains "that any building, etc., partially destroyed by fire, or any other cause, and suffered to remain in such condition after notice to the owner, etc., shall constitute a nuisance." The latter is declared to exist as the result of these naked facts, and authority is given to the department of public works to abate such declared nuisance at the expense of the owner of the property. These facts alone are the test. The ordinance erects no other standard by which the supposed nuisance is to be measured or determined. No reference or regard whatever is had as to the condition, character, situation or surroundings, which might tend to render the building unsafe in any manner to the public, or a detriment to the health or inconvenience of the public. There is an entire absence of facts declared, tending to show that if such partially destroyed building is suffered to remain it may be productive of annoyance or injury to the public.

That such a building may become a nuisance if maintained by reason of the ruinous and weak condition of its walls or other parts, thereby rendering them liable to fall and do injury to persons passing by, or resulting in injury to an adjoining owner, is a well established legal proposition. It is said by an eminent author, that such a building, as last mentioned, on a public street is a public nuisance and a private nuisance to those owning property adjacent to it. Wood's Law of Nuisances, section 109. It is evident, however, that in such a case the nuisance would not consist alone in the fact that the building was one that had been partially destroyed, but in its being maintained in its unsafe or dangerous condition.

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It may, however, be maintained in a partially destroyed condition, and yet be harmless in all respects. The unsafe condition thereof depending on the extent of the destruction, and another feature to be considered would be whether it was remote from a public street or passway. But the ordinance does not take into account any of these facts or features, but expressly condemns and outlaws as a nuisance the maintaining of any partially destroyed building without regard to its character, as to danger, by reason of its weak condition, or location or surroundings. By section 23 of the act under which the city of Evansville is operating, its common council is empowered to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing the same or suffering it to exist. Acts 1895, p. 259. But the rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in fact is not. *First Nat. Bank, etc., v. Sarlls*, 129 Ind. 201, and authorities there cited; *Baumgartner v. Hasty*, 100 Ind. 575; *Village of Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677; *City of Denver v. Mullen*, 7 Col. 345, 3 Pac. 693; *Everett v. City of Council Bluffs*, 46 Ia. 66; *Yates v. Milwaukee*, 10 Wall. 497; Tiedeman Lim. Police Powers, section 122; Wood's Law of Nuisances, sections 742, 743 and 744; *Lippman v. City of South Bend*, 84 Ind. 276; Dillon Munic. Corp., section 374; *State v. Jersey City*, 29 N. J. L. 170; Beach. Pub. Corp., sections 1026, 1029 and 1031.

In *Yates v. Milwaukee*, *supra*, the Supreme Court of the United States, in considering the power conferred upon the city of Milwaukee to declare what shall constitute a nuisance, per Justice Miller, said: "It is a doctrine not to be tolerated in this country,

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that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

In the case of the *Town of Lake View v. Letz*, 44 Ill. 51, it is said: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances."

In *Tiedeman Lim.*, section 122a, it is said: "A certain use of lands, harmless in itself, does not become a nuisance, because the legislature has declared it to be so."

In *City of Denver v. Mullen*, *supra*, the Supreme Court of Colorado in construing a provision in the charter of the city of Denver conferring authority upon its council to declare what shall be a nuisance and to prevent and abate the same, held that such conferred power did not authorize the council to arbitrarily declare any particular thing a nuisance which had not theretofore been pronounced such by law or so adjudged by a judicial determination. In the course of the opinion, on page 353, the court said: "The proper construction of this language is, that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority,

declare by ordinance that slaughter houses within the limits of the city, carcasses of dead animals left lying within the city, goods boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination."

We think it is clear, under the authorities, that the common council, by the ordinance in controversy, attempted to declare that a nuisance which in fact, under the law, cannot be so considered, and therefore transcended the power with which it was invested. As asserted by the authorities, it would be a dangerous doctrine and fraught with much evil to recognize the authority of a municipal legislature to declare that a nuisance which its own caprice might deem proper to outlaw as such. Even though such power is expressly conferred by the legislature, it is utterly inoperative, unless the thing so declared to be a nuisance is one in fact, or was created or erected after the adoption of the ordinance and in defiance thereof. Wood's Law of Nuisance, section 744.

What the legislature cannot do directly in this respect it cannot authorize a municipal corporation to do. Without further extending this opinion, we are, under the authorities cited, constrained to hold that the part of section one of the ordinance, as indicated by the italics, is void for the reasons herein stated, and the proceedings thereunder by the city, involved in the case at bar, consequently, cannot be maintained.

Judgment affirmed.

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BARTLETT ET AL. v. MANOR ET AL.

[No. 17,835. Filed January 27, 1897.]

WILLS.—*Setting Aside a Will and Establishing Lost Will, Enforced in Same Proceeding.*—While the right to set aside a will and its probate is given by statute, and the right to establish a lost or destroyed will is of equitable cognizance, yet both rights may be enforced in one proceeding. p. 623.

SAME.—*Substitution of Unprobated Will for Probated Will.—Contest.—Limitations.*—A proceeding to substitute one will, not probated, for another which has been probated, involves the contest of the latter will, and must be commenced by the filing of complaint or petition within three years after such latter will has been offered for probate, as provided by section 2766, Burns' R. S. 1894.

From the Delaware Circuit Court. *Affirmed.*

J. N. Templer, E. R. Templer, R. S. Gregory and A. C. Silverburg, for appellants.

Ryan & Thompson, for appellees.

HACKNEY, J.—The appellants, heirs of James L. Bartlett, instituted this proceeding in the circuit court against the appellees, heirs of Mary A. Watt.

The amended complaint alleged that in the year 1855 said James L. Bartlett, by the provisions of his will then executed, devised the lands in controversy in fee-simple to his wife, Mary A. Bartlett, who, after his death, married one Watt; that in the year 1861 said James executed another will, in which he devised to said Mary an estate in said lands for life and revoked the will of 1855; that said Mary was given the custody of said two wills, which she held until after the death of said James, when, in 1861, she offered the will of 1855 for probate in the office of the clerk of the common pleas court of Delaware county, and made proof of the execution thereof by the affidavit,

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147 462

146 621
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153 892
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146 621
169 158

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taken before said clerk, of one of the attesting witnesses, and caused the said will and proof to be recorded in the proper record of wills in said office. There were allegations of the fraudulent concealment by the said Mary of said will of 1861; the ignorance of its existence by the appellants; the death of its attesting witnesses and the scrivener who drew it, and the discovery of its execution before this proceeding was instituted, in June 1892.

The relief sought was the overthrow of the will of 1855, with the steps taken in probate thereof, and the establishment and probate of the alleged will of 1861.

The circuit court overruled demurrers by the appellants to answers by the appellees, alleging that the cause of action sued upon did not accrue within the three years next preceding the bringing of the action. That ruling presents the only question for decision by this court.

There is much said by counsel of the theory of the case, as presented by the complaint, the principal difference between them relating to the inquiry as to whether the establishment and probate of the will of 1861 was the primary and controlling element of the cause of action, with the cancellation of that of 1855 together with the probate thereof as the mere incident, or that the contest of the validity of the will of 1855, with the probate thereof, was the essential feature of the cause and the establishment of the later will as an incident.

The right to set aside a will and its probate is given by statute, Burns' R. S. 1894, section 2766 (R. S. 1881, 2596), and the right to establish a lost or destroyed will is of equitable cognizance and has statutory recognition only in respect to the proof required, the record of the decree and the restraining of proceedings in relation to the estate pending the litigation.

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Burns' R. S. 1894, section 2777 *et seq*; *Wright v. Fultz*, 138 Ind. 594. This latter right, however, is as firmly settled as the former. No question is here made but that the two rights may be enforced in one proceeding, and that they may, has been recognized by this court as proper. *Burns v. Travis*, 117 Ind. 44; *Roberts v. Abbott*, 127 Ind. 83; *McDonald v. McDonald*, 142 Ind. 55.

Assuming the right to so proceed, the essential purpose and object of the complaint was to substitute for one will and its probate, another will and to secure the probate thereof.

The right of substitution involved the overthrow of the will of 1855 as clearly and as certainly as it involved the establishment of that of 1861; both were essential elements of the cause of action, and neither could have been held merely an incident to the other in pleading the facts and outlining the theory of the action. Both were of the essence of the single definite theory upon which the pleading proceeded to the attainment of the one object, that of substituting one will and its probate for another.

This conclusion is of vital importance in passing upon the sufficiency of the answers in question, since it must bring before us a consideration of the limitation which applies to an action to set aside the probate of a will and overthrow such will. If the primary question were the establishment of the will of 1861, and the other question were but an incident and not essential to the theory of the action, we would have but little consideration of any such nonessential incident.

It has been distinctly decided by this court that a proceeding to substitute one will, not probated, for another, which has been probated, involves the contest of the latter will and requires an observance of the rules of procedure declared by statute. *Burns v.*

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Travis, supra. That holding necessarily involves an adherence to the conclusion we have reached, that the theory of the case includes as one of its primary features the overthrow of the will of 1855 and its probate. If, as there held, such an attack upon the probated will is a contest thereof, we must look to the statutory provisions governing contests to learn if the limitation pleaded is there provided. Chapter 9, Art. 3, sections 2765-2776, Burns' R. S. 1894, include the provisions governing the contest of wills and their probate, prescribing in detail the procedure throughout.

Section 2766 provides that "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court * * * his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, * * * or any other valid objection to its validity or the probate thereof. * * *"

Appellants' learned counsel expressly concede that under this provision the right to contest a will or the probate thereof is only given upon the condition or limitation that the complaint or petition be filed within three years after the will has been offered for probate; but they insist that by section 301, Burns' R. S. 1894, the limitation was extended. That section provides that a cause of action which has been concealed may be prosecuted within the period of limitation after discovery. It is, however, a part of the general code and one of numerous sections providing the limitation of actions under the code. One of said sections, Burns' R. S. 1894, section 295, provides that "In special cases, where a different limitation is prescribed by statute, the provisions of this act shall not apply." It would seem, therefore, that, by legislative declaration, the limitation prescribed by section 2766,

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supra, is not extended by said section 301. However, it is fully established that when a right is given and the procedure for its enforcement is provided by a special statute, the procedure so provided excludes resort to another or different procedure. *Harrison Nat. Bank v. Culbertson*, (Ind. Sup.), 45 N. E. 657; *Edgerton v. Huntington School Tp.*, 126 Ind. 261; *Ryan v. Ray*, 105 Ind. 101; *Storms v. Stevens*, 104 Ind. 46; *Fisher v. Tuller*, 122 Ind. 31.

Of this proposition counsel for the appellants say: "We are free to admit that in Indiana this doctrine seems to be advocated by this court in the *Fisher v. Tuller* case, *supra*; in other words, our Supreme Court seems to have laid down the rule that if the statute which gives the right of action contains its own limitations no exceptions can be ingrafted upon it by the courts, but that the law must be applied as it is written, and we take this to mean that the exceptions contained in the general statute of limitations, heretofore referred to, do not apply to such cases." Counsel make this concession consistent with their contention that section 301, *supra*, extends the period of limitation by their insistence that the cause of action alleged in the complaint is primarily for the establishment of a lost or destroyed will, the right to which action is not given by the special statute for the contest of wills and their probate, and the procedure for which is governed by the civil code. If the premises assumed were correct the conclusion would seem to follow; but from what we have said of the theory of the action, but little remains to demonstrate that the premises so assumed are not correct.

It is manifest that for the repose of titles by devise, the legislature included in the provisions of section 2766, *supra*, the requirement that the contest of a will

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or of its probate should be instituted within three years from the time of offering the will for probate. This wise object so clearly manifested cannot be lightly passed over or set aside, but we must give it full force without ingrafting conditions upon it. The will of 1855 is conceded to have been genuine, and the allegations of the complaint do not deny the efficacy of the proof and recording to constitute a legal probate. This being true, regarding section 2766, *supra*, as closing the door against contest, and accepting the holding of *Burns v. Travis, supra*, that contest is here involved, we meet with an insurmountable obstacle to the recognition of the relief sought by the appellants. As long as the bar stands against the contest we have a barrier against establishing a will to substitute for it. Substitution includes as much the overthrow of one as the proof that another existed; the relief sought includes both, and neither demand can stand without the other. Since contest is forbidden, and the will of 1855, with its probate must stand, substitution becomes impossible.

If this result can be said to be a hardship, considering the importance of the reasonable security of titles and the possibility of fraudulent concealment of later wills, the hardship must be due to the failure of the legislature to ingraft an exception upon the limitation of section 2766, *supra*. The courts are powerless to create an exception, but if they had such power they would be confronted with a serious question of the wisdom of exercising it, since the repose of titles, the possible fraudulent concealment of a last will revoking a former which is probated, and the equally possible fraudulent creation, by parol, after more than thirty years of repose, of a substituting will, would call for a cautious hesitancy before taking the step.

In *Fisher v. Tuller, supra*, this court refused to ex-

tend, on account of fraud, the period of limitation created by a special statute, in the absence of exception, and held that notwithstanding the fraud no power existed in the courts to ingraft an exception upon the statute. It is true that this holding was with reference to a purely legal liability, involving no equitable demand, but it rested upon a special statute containing a special limitation.

That section 301, *supra*, extending, on account of concealment, the period of limitation provided in that special statute, could not be considered as affecting the question is manifest, not only from the provisions of section 295, *supra*, denying its application, but from the rule which holds the limiting provisions of such special statutes to be of the essence of the right, rather than to simply cut off the remedy, as with general statutes of limitation. This rule is stated in 13 Am. and Eng. Ency. of Law, p. 689, as follows: "Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, * * *. Such special limitations extinguish the right rather than affect the remedy." This statement of the rule is supported by *The Harrisburg*, 119 U. S. 199; *Taylor v. Cranberry Iron, etc., Co.*, 94 N. C. 525; *Finnell v. Southern, etc., R. W. Co.*, 33 Fed. 427; *Hudson v. Bishop*, 32 Fed. 519, 35 Fed. 820; *Smith v. Tripp*, 14 R. I. 112.

Such statutes are not extended by disability or fraud. 13 Am. and Eng. Ency. of Law, p. 690; *Taylor v. Cranberry Iron, etc., Co.*, *supra*; *Suggs v. Insurance Co.*, 71 Texas 579, 9 S. W. 676, 1 L. R. A. 847; *Cochran v. Young*, 104 Pa. St. 333; *Luther v. Luther*, 122 Ill. 558.

The last two cases involves the contest of probated wills instituted after the period within which the

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right to contest was given. See also *Spicer v. Hockman*, 72 Ind. 120; *Horton v. Hastings*, 128 Ind. 103; *Potts v. Felton*, 70 Ind. 166, holding that a special right given by law to be exercised within a time or manner prescribed is exclusive as to such time or manner.

It cannot be seriously questioned that our statute of wills is special with reference to the right of contest, that it creates a right not existing in its absence, and that the right is given upon the condition that it be exercised within three years. As to this right it cannot be doubted, we think, that the general statute of limitations has no effect. Nor do we think that the rules of equity as applied to general statutes of limitation, where the right sought to be enforced is of equitable cognizance or is of concurrent jurisdiction of both law and equity, may be applied to the right to contest a will so as to lift the case out of the special limitation. That right is, as we have indicated, one of purely legal origin and is given upon a condition not extended by any exception, and an exception interposed from any supposed equitable considerations would deny the force of the statute and ascribe to equitable jurisdiction a power to control the exercise of a purely legal right, notwithstanding the expressed inhibitions of the law granting such legal right. We do not understand the learned counsel for the appellants to contend that such overruling power exists in equity, but we understand them to insist that considering this action to relate to the establishment of the will of 1861, a question of equitable jurisdiction, the rules of equity, in view of the alleged fraud, would extend the right of action or suspend the period of limitation until the discovery of the fraud.

The case before us, however, presents, as we have shown, the assertion of an equitable right dependent upon a legal right which has been lost by delay be-

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yond the period in which the right is given. It is not a case of concurrent legal and equitable jurisdiction, nor of exclusively equitable cognizance. It is a case where a legal right and an equitable right are sought to be blended and enforced under our practice where the distinction between actions at law and in equity is abolished; but such blending fails because the legal right has lapsed and has existence no more than if it had never been created.

The ruling of the lower court was right, and the judgment is affirmed.

MONKS, J., was not present.

GUY ET AL. v. BLUE ET AL.

[No. 17,857. Filed January 27, 1897.]

PLEADING.—*Fraud.—Necessary Allegations of Fraud.*—The use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred.

SAME.—*Fraud.—Action to Set Aside Deed.*—In an action to set aside a deed alleged to have been procured by fraud it must appear from the averments of the complaint that there was an intention to deceive and that in reliance upon the facts, with the use of ordinary care, they were acted upon in good faith and the deception accomplished to the prejudice of the other party.

APPEAL AND ERROR.—*Waiver of Error.—Failure to Discuss Errors in Brief.*—Where a demurrer is sustained to a complaint for the reason that the action is barred by the statute of limitations and such ruling is assigned as error on the ground that the complaint shows that the action is excepted from the operation of the statute, the questions thus raised goes to the sufficiency of the facts averred in the complaint and the failure to discuss the question of the sufficiency of the complaint will be considered a waiver of the error.

From the Kosciusko Circuit Court. *Affirmed.*

Wood & Bowser, Bertram Shane and L. W. Royse, for appellants.

H. S. Biggs and M. H. Summy, for appellees.

146	629
153	498
146	629
162	488
146	629
164	599
146	629
166	143
166	147

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MCCABE, J.—The appellants sued the appellees in a complaint of two paragraphs, to set aside certain deeds of conveyance of certain lands in Kosciusko county. The issues joined were tried by the court, resulting in a finding and judgment for the defendants.

The only error assigned calls in question the action of the trial court in sustaining a demurrer to the amended second paragraph of the complaint.

The substance of that paragraph is as follows: "The plaintiff, Susan Guy, and her husband, Lorenzo D. Guy, complain of the defendants and say, that on April 21, 1885, and for several years prior thereto, one William Blue was the owner in fee-simple of certain lands which are particularly described in Kosciusko county, Indiana; that on said day said William was over eighty years old, and was then, and had been for more than five years prior thereto, greatly enfeebled, both in body and mind, and so continued until his death, and by reason thereof easily susceptible to the influence, arts and persuasions of others; that during said period of time the defendants, Simeon, Benjamin, Samuel, and Peter W. Blue, sons of said William, well knowing his weak and enfeebled condition aforesaid, corruptly conspiring, contriving and intending to profit thereby, and to cheat and defraud said William of said lands, made frequent visits to him, and by means of persistent, continuous and undue persuasion, and undue, corrupt and overpowering influence exercised by said defendants over and upon said William, so wrought upon the mind and inclinations of said William that on said day, April 21, 1885, they procured the said William to execute to each of said defendants, Simeon, Benjamin, Samuel, and Peter W. Blue, a separate deed, purporting to convey to each a certain described portion of said land; that said defendant, Sarah M. Blue, being then the wife of said

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William, joined in said pretended conveyances; that at the time of the execution of said instruments said lands were of the value of \$18,000; that said instruments were procured by the defendants, Simeon, Benjamin, Samuel, and Peter W., through the corrupt, fraudulent, and dishonest practices and means aforesaid, by which the will and intent of the said William were by said defendants wholly overpowered and controlled; that said defendants, by means of said corrupt, fraudulent and dishonest practices and means aforesaid continued to so control the will and judgment of said William up to the time of his death, and thereby continued to prevent him from obtaining a knowledge or discovering that he had by the aforesaid means been defrauded of his said lands; that during his life time he did not discover the same, and by the means aforesaid defendants concealed from said William the fraud that had been practiced upon him; that on February, 1893, the said William departed this life, leaving surviving him as his only heirs his widow, Sarah M. Blue, who was his second wife, and by whom he had no children, and defendants, Simeon, Benjamin, Samuel, and Peter W., and the plaintiff, Susan, his children by a former marriage; that unless said deeds are set aside they will deprive the plaintiff, Susan, of the one-fifth of said lands, which she would inherit from her father; that before bringing this suit she rescinded and disowned said deeds and notified said defendants, Simeon, Benjamin, Samuel, and Peter W. thereof. Wherefore," etc.

The only question discussed by counsel on both sides relates to the question, not whether the facts stated in the paragraph are sufficient to constitute a cause of action, but whether the court was justified in sustaining the demurrer on the ground that the facts stated in the pleading showed that the cause of

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action was barred by the statute of limitations. Against the bar of the statute the appellants' counsel contend that the pleading showed that the alleged fraud had been so concealed that the action is exempted from the operation of the statute. But if the action is to be regarded as one for relief against fraud, then the court's ruling in holding the paragraph bad is justified, because no fraud is charged. If epithets liberally applied to the defendants were sufficient the paragraph might be regarded as good. But it has long been well established that the use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. An intention to deceive must appear and that in reliance upon the facts, with use of ordinary care, they were acted upon in good faith and the deception accomplished to the prejudice of the other party. *Hardy v. Brier*, 91 Ind. 91; *Howe, etc., Co. v. Brown*, 78 Ind. 209; *Fry v. Day*, 97 Ind. 348; *Bennett v. McIntire*, 121 Ind. 231; *Conant v. Nat'l, etc., Bank*, 121 Ind. 323; *Stroup, v. Stroup*, 140 Ind. 179, 27 L. R. A. 523; *Jackson v. Myers*, 120 Ind. 504.

The appellants' counsel contend that the statute of limitations furnishes no excuse for the ruling of the circuit court. But the ground of the contention is a misconception. They contend that the pleading showed that the action was exempted from the operation of the statute because of the concealment of the cause of action alleged in the paragraph, and cite in support of such contention *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545. It is there said: "The rule is, that where the limitation in a certain case is absolute, and there are no exceptions to the running of the statute, and the complaint shows, upon its face, that the action is commenced after the time limited, the question can be raised on demurrer. But where there

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are exceptions to the period limited by statute, in any case, and the complaint shows, upon its face, that the action was not brought within the time limited, still the question cannot be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute.

“The complaint in the case under consideration does not show this. The law in this State is adverse to the contention of the appellant corporation. *Hanna, Admr., v. Jeffersonville R. R. Co.*, 32 Ind. 113; *Potter v. Smith*, 36 Ind. 231; *Harlen v. Watson*, 63 Ind. 143; *Baugh v. Boles*, 66 Ind. 376; *Kent v. Parks*, 67 Ind. 53; *Cravens v. Duncan*, 55 Ind. 347.

• “At the time the plaintiff’s cause of action accrued, she was an infant, and might also have labored under some other supervening disability that arrested the progress of the statute and exempted her from its effect, or she might have rested under divers other legal incapacities, for aught that appears in the complaint.” Burns’ R. S. 1894, sections 293-307 (R. S. 1881, 292-306).

There are many exceptions and disabilities mentioned in this statute exempting cases coming within them from the operation of the statute. For instance, the plaintiff might have been under disability, and hence the question whether the action was brought too late under the statute could not be presented or raised by the demurrer. Hence the correctness of the ruling of the court in overruling the demurrer to the paragraph must depend upon the question whether the facts stated in the paragraph are sufficient to constitute a cause of action. Just such a paragraph of complaint was involved in *Wray v. Wray*, 32 Ind. 126. The trial court there, as here, had held the paragraph bad, and this court holding that the same evidence was admissible under the other paragraph setting up substantially the same facts with the addition of the

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allegation of unsoundness of mind, held that "there was no available error in sustaining the demurrer."

But this court, in that connection, remarked that: "We do not wish to be understood, however, as holding that the paragraph to which the demurrer was sustained is good. To say the least, it is not a good specimen of pleading." The first paragraph in this case, like that of the case last cited, set up the same facts with the additional allegation of unsoundness of mind, but unlike that case the first does not allege fraud and undue influence.

But as to whether the facts stated in the paragraph, including the allegations of fraud and undue influence, are sufficient to constitute a cause of action, neither the appellant nor the appellee have said one word in their briefs. As said in *Bonnel v. Shirley*, 131 Ind. 362: "Nor is there even a suggestion of any reason, or ground, for holding the action of the court below erroneous."

The demurrer, the sustaining of which was assigned for error, challenges the sufficiency of the facts stated in the paragraph.

Not a single reason is assigned nor authority cited in appellants' brief why such facts are sufficient to constitute a cause of action, or why the trial court erred in holding them insufficient in sustaining the demurrer. It is said by Judge Elliott, in his App. Proced., section 444, that: "It is essential that all points be made in the brief, and properly made; if not so made they are waived. Many cases affirm this doctrine, although the phrase employed usually, not always, however, is, all questions not made in the briefs are regarded as waived." The cases cited in support of the text are, *W. U. Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Wright v. Abbott*, 85 Ind. 154; *Stockton v. Lockwood*, 82 Ind. 158; *Fairbanks v. Meyers*, 98 Ind. 92; *Ohio*,

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etc., *R. W. Co. v. Nickless*, 73 Ind. 382; *Daniels v. McGinnis*, 97 Ind. 549; *Kennell v. Smith*, 100 Ind. 494; *Pittsburg, etc., R. R. Co. v. Williams*, 74 Ind. 462.

We therefore hold if there was any error in sustaining the demurrer to the amended second paragraph of the complaint such error was waived by appellants' failure to discuss the question in their briefs.

Judgment affirmed.

 PENNINGTON v. MARTIN.

[No. 17,762. Filed January 28, 1897.]

146	635
171	342

LIS PENDENS.—*Failure to File.*—*Bona Fide Purchaser.*—Where a decree to enforce a vendor's lien has been reversed on appeal to the Supreme Court, and such reversal has been entered in the lower court, and no *lis pendens* notice having been filed, one purchasing the real estate against which the lien is sought to be enforced, takes it discharged of such lien.

From the Boone Circuit Court. *Affirmed.*

H. C. Wills and *Ralston & Keefe*, for appellant.

T. J. Terhune, for appellee.

HACKNEY, J.—The appellee, James M. Martin, sued the appellant, Isaac Pennington, to quiet his title to a tract of land in Boone county.

The questions for decision arise upon exceptions to conclusions of law stated upon a special finding of facts. Briefly stated, the facts found were that, in October, 1889, the appellant conveyed said tract to his son, James, who, in July, 1891, conveyed, through another, to his wife, Laura F. Pennington. Later James died, and the appellant sued Laura to enforce a vendor's lien against the land for \$600.00, and he obtained a decree for \$206.83 and a lien in January, 1892. From

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that decree he appealed to this court, where he obtained a reversal because of the insufficiency of the amount found in his favor. *Pennington v. Pennington*, 138 Ind. 8. On the day following the reversal, May 10, 1894, the clerk of the lower court noted upon the judgment docket, opposite the entry of the rendition of said decree, the fact of said reversal. On June 21, 1894, the appellee purchased from said Laura the lands in question and received from her a deed of conveyance therefor upon full consideration then paid. Until June 25, 1894, said Martin had no actual knowledge of any claim against said land, nor of the pendency of said suit, when an attorney for the appellant advised him of the suit and of the claim. On said day, for the first time, the appellant caused a *lis pendens* notice to be entered in said clerk's office. Thereafter said suit between said Isaac and Laura Pennington proceeded, without making Martin a party, until in January, 1895, when said Isaac obtained a decree for \$600.00 and a lien upon said land as against said Laura.

The conclusions of law were that the appellee was not chargeable with actual or constructive notice of the appellant's lien, that he was not estopped by the last mentioned decree and that his title should be quieted.

The statute, Burns' R. S. 1894, section 327 *et seq*, provides that "whenever any person shall have commenced a suit, whether by complaint, or by cross-complaint as defendant, to enforce any lien upon, or right to, or interest in any real estate upon any claim not founded upon an instrument executed by the party having the legal title to such real estate, as appears from the proper records * * *. It shall be the duty of such person to file with the clerk of the circuit court in each county where the real estate sought to be af-

Pennington v. Martin.

affected is situated, a written notice containing the title of the court, the names of all the parties to such suit, a description of the real estate to be affected, and the nature of the lien, right, or interest sought to be enforced against the same;" which notices shall be recorded in the Lis Pendens Record. Until such notices are filed as thus required "the bringing of suits for the purposes mentioned * * * * shall not operate as constructive notice of the pendency of such suits, * * * * nor have any force or effect as against *bona fide* purchasers or incumbrances of" said real estate.

The lien sought to be enforced by this appellant was one clearly within the provisions so requiring notice of the pending suit. What then was the effect of his failure to file the notice until after the appellee had purchased the land, paid his money and received the conveyance? The answer of the statute is, that if the appellee was a *bona fide* purchaser, that failure shall defeat constructive notice of the pendency of the suit.

The learned counsel for the appellant suggest that courts do not favor *lis pendens* statutes, and will not construe them broadly. If this were true we find no room for a construction which would eliminate, or even modify the strong words of the statute that until the notice is filed the bringing of the suit "shall not operate as constructive notice." Statutes of this class are numerous and have often been construed by the courts. The decisions are uniform in holding that "The *lis pendens* acts limit the method of creating *lis pendens*—they abrogate the common law upon the subject, and if the statutory mode be not followed, there can be no *lis pendens* as to third parties." Bennett on Lis Pendens, section 321; *Bensley v. The Mountain Lake, etc., Co.*, 13 Cal. 306; *Corwin v. Bensley*, 43 Cal. 253; *Jorgenson v. Minneapolis, etc., R. W. Co.*, 25 Minn. 206; *Arnold v. Casner*, 22 W. Va. 444, 459;

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Burroughs v. Reiger, 12 How. Pr. 171; *Tate v. Jordan*, 3 Abb. Pr. 392; *Abadie v. Lobero*, 36 Cal. 390; *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321; 13 Am. and Eng. Ency. of Law, p. 895.

In the authority last cited the rule is stated that "Where no notice of *lis pendens* is filed or recorded and no actual notice to the party interested is shown, there is no binding *lis pendens*." See also *Smith v. Gale*, 144 U. S. 509, 526.

If constructive notice, without the filing required, is denied by statute, and since it is found that the appellee had no actual notice of the suit or claim therein when he purchased, there seems no escape from the conclusion that he is not bound by the result of the suit. The decree which is relied upon by counsel for the appellant in support of his lien against the appellee's claim of title is that last rendered, and in the nature of the case this must be, since the first decree was held erroneous and, when this suit was brought, stood for naught. If the pending litigation had been constructive notice to Martin of the amount of the claim or judgment of the appellant, and had the judgment continued in force, its lien as a judgment for money, and not as a specific decree declaring the lien for unpaid purchase money, might have been effective, but in view of our statutory provisions the specific lien constituted no constructive notice, and the reversal of the judgment relieved the property from the lien as a judgment upon a money demand.

The case of *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351, is cited on behalf of the appellant as holding, and it does hold, that in the county where the suit is pending for the enforcement of the lien, if the description of the land and the object of the suit appear from the complaint, the suit will be constructive

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notice to purchasers of the lands in such county, even if the *lis pendens* notice is not filed.

The *lis pendens* statute of North Carolina, under which that decision was made, differs widely from our statute. It is there but provided that such notice may be filed. It is not required to be recorded, and the failure to so file is not declared, as in our statute, to deny constructive notice from the pending suit. It is possible, under the statute of that state, to hold that the filing of a complaint containing all of the elements of notice required by the statute would constitute constructive notice. Such holding is not possible under our statute.

Nor do we observe the force of the suggestion of counsel for the appellant that the appellee should have sought to become a party to the suit between Isaac and Laura F. Pennington after he became advised of the claim of said Isaac to a vendor's lien. Appellee then held the legal title to the lands, unaffected by constructive notice of the pending suit, and to have intervened would have accomplished nothing that was not then secured to him by his deed.

In the absence of both actual and constructive notice of the vendor's lien the appellee could certainly not be estopped to maintain his title by deed.

The judgment is affirmed.

KOERNER LODGE, No. 6, KNIGHTS OF PYTHIAS ET AL.
v. THE GRAND LODGE, KNIGHTS OF
PYTHIAS OF INDIANA.

[No. 17,800. Filed January 28, 1897.]

BENEFICIAL ASSOCIATIONS.—*Surrender of Charter by Subordinate Lodge.*—*Evidence.*—Where on the trial of a cause brought by a beneficial association or order against a subordinate lodge to recover possession of certain money and property on the ground that defendant lodge had voluntarily surrendered its charter, it having

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been shown that at a regular meeting of defendant lodge a resolution had been adopted withdrawing from the order, and it having been further shown that under the constitution and laws of the order no subordinate lodge could withdraw from the order, except by special permission, so long as nine members remained who were willing to continue, it is error to exclude evidence to show that eleven members of the subordinate lodge, not present at the time the withdrawal resolutions were adopted, formally protested against such action, at the subsequent meeting of the lodge when the minutes, including the withdrawal resolutions, were adopted.

SAME.—*Voluntary Dissolution.*—A beneficial association may be dissolved in the manner provided in its charter or constitution, and in the absence of any provision on the subject it can voluntarily be dissolved by the unanimous vote of its members.

SAME.—*Diverting Funds.—Ultra Vires.*—The members of a beneficial association have no power to divert the funds and property of their lodge from the specified purposes to which, under the laws of the order, the same had been dedicated, and a resolution seeking to so divert such funds and property is *ultra vires*.

From the Marion Circuit Court. *Reversed.*

Florea & Seidensticker and *D. W. Howe*, for appellants.

Chambers, Pickens & Moores and *J. B. Cockrum*, for appellee.

JORDAN, C. J.—The appellee, by its complaint, alleges that it is a corporation organized pursuant to the laws of Indiana and a charter issued by the Supreme Lodge, Knights of Pythias of the World, and that the appellant is a subordinate lodge of this order, deriving its powers from and subject to the jurisdiction of the grand and supreme lodges. That appellant is duly incorporated under the laws of Indiana, and its co-appellants are its officers and trustees. The complaint then proceeds to describe the objects of the order and the character of its organization, and the control of the appellee over subordinate lodges, and the power which it has to suspend or dissolve the

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same, and the provisions regulating the surrender of the charters of subordinate lodges, whereby upon such dissolution or suspension it becomes the duty of the officers thereof to turn over all of the lodge property and effects to the grand chancellor of the grand lodge, and in the event the lodge is not reinstated within one year, the grand lodge becomes the absolute owner of said property and effects. The pleading next alleges that the appellant has seceded from the jurisdiction of the grand lodge and has been dissolved and disbanded as a subordinate lodge of the order of the Knights of Pythias. The facts upon this point are averred as follows: "That on or about the — day of — the said defendant, Koerner Lodge No. 6, Knights of Pythias, was, by authority of a dispensation from the Grand Lodge, Knights of Pythias of Indiana, duly organized as a member of said order, and adopted and accepted all of the provisions and requirements of the constitution, laws, rules, regulations, and usages of said order, and was granted a charter by said grand lodge; that said Koerner Lodge continued as a subordinate lodge of said order, subject to the jurisdiction of the plaintiff, accepting, adopting, and acting upon the laws, rules, regulations, and usages of said order until on or about the 10th day of September, 1894, when the said Koerner Lodge No. 6, Knights of Pythias withdrew and seceded from the jurisdiction of the said grand lodge and dissolved and disbanded as a subordinate lodge of the order of Knights of Pythias. * * * * The said Koerner Lodge No. 6, Knights of Pythias seceded and withdrew from the order of the Knights of Pythias and dissolved and disbanded as a subordinate lodge of the said order because of the fact, as plaintiff is informed and believes, and upon such information and belief charges the

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same to be true, that the Supreme Lodge of the Knights of Pythias of the World prohibited the use of the ritual of said order in German, which rule of said supreme lodge the said Koerner Lodge No. 6 refused to obey."

By other averments it is shown that at the time of the alleged dissolution and disbandment of appellant, it had in its custody and charge belonging to the widows and orphans' fund the sum of \$1,000.00, and also other property of the probable value of \$2,000.00 and over. It is then alleged that the officers and members of Koerner Lodge have organized, or attempted to organize, another society, and that its officers and trustees intend to turn over the money and property mentioned in the complaint to this new society.

The prayer of the complaint in substance is for a decree requiring the defendants, now appellants, to surrender to the appellee all of said property, effects and money, and that the latter have judgment for the amount thereof, and that appellants and each of them be restrained from transferring or disposing of said money and other property, and that on final hearing they be enjoined from withholding the same from the appellee, etc.

At the commencement of the action the lower court issued a restraining order as prayed, to continue in force until the final hearing.

Appellant having unsuccessfully demurred to the complaint, filed its answer in two paragraphs, the first being a denial. The second set up facts tending to negative some of the material allegations of the complaint. A demurrer was sustained to this paragraph of the answer, and the issues were then joined under the denial. A trial by the court resulted in a finding and judgment for appellee as against all of the appellants. Upon the evidence the court made the follow-

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ing finding: "The court being fully advised finds that the allegations of the complaint herein are true. And the court further finds that the defendant, Koerner Lodge Number Six (6), Knights of Pythias, on the 10th day of September, 1894, was, by unanimous vote of said lodge duly assembled, voluntarily dissolved and its charter surrendered, and its connection with the order of the Knights of Pythias severed and terminated; that at the time of said dissolution it had in its possession and under its control, belonging to it as such subordinate lodge, the following funds and property, to-wit: [Here follows a description of the money and property belonging to appellant.] And the court further finds that upon such dissolution said funds and property belonged to and became the property of the plaintiff, and plaintiff became entitled to the possession thereof."

There is a further finding that Koerner Lodge has not been resuscitated, and under the constitution and laws of the Order of Knights of Pythias its property now belongs to the appellee, to be disposed of by it in accordance with its constitution and laws.

Appellants filed separate motions for a new trial, assigning among other reasons that the finding is not sustained by sufficient evidence, and that the court erred in excluding certain evidence. Each of these was overruled and exceptions reserved. The errors assigned in this court are predicated upon the rulings of the court on the demurrers to the complaint and answer and in overruling the several motions for a new trial.

Appellants' learned counsel contend that the court erred in sustaining the demurrer to the second paragraph of answer, and in their very able argument upon this question urge that even if it be conceded that Koerner Lodge has been dissolved, as alleged in

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the complaint, its property nevertheless belongs to its members and not to the grand lodge. All that need be said upon the action of the court in sustaining the demurrer to this paragraph of the answer is that, so far as the facts therein averred were pertinent as a defense, they were admissible under appellants' general denial, hence, even if the ruling of the court was erroneous, the error was harmless. *The Jeffersonville Water Supply Co. v. Riter, ante*, 521, and the authorities there cited.

Appellants also insist that the evidence does not sustain either the allegations of the complaint or the finding of the court. The complaint proceeds upon the theory that appellant, Koerner Lodge, on September 10, 1894, by its own action dissolved and disbanded, and by reason thereof, under the laws, rules and regulations of the Order of Knights of Pythias, and especially by virtue of the constitution of appellee, the latter became the owner in trust and entitled to the possession of the money and property held by the former at the time of its alleged dissolution.

In *Cummings v. Citizens' etc., Assn.*, 142 Ind. 600, in considering the theory of a case, we said: "This theory, the complaint must outline, the evidence sustain, and the law support." The question, therefore, as to the right or title of appellee to the money and property, as presented by the theory of its complaint, must ultimately depend upon whether the evidence sustains the alleged dissolution of appellant as a subordinate lodge. The constitution, laws and rules of the grand lodge, as exhibited in the complaint, do not show that appellee can acquire any right to the possession of the money and other property of a subordinate lodge until it in fact has been dissolved or suspended. Therefore, if the evidence, under the law, does not sustain the alleged dissolution of Koerner lodge,

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the question as to appellee's right to the property need not be determined. The finding discloses that, in the opinion of the court, the evidence established that appellant, on September 10, 1894, had voluntarily dissolved as a lodge and surrendered its charter. We may therefore proceed to an examination of the evidence given in the lower court, and address our inquiry to its sufficiency to sustain the finding, and also to the alleged error in excluding the evidence in dispute. At the trial appellee introduced in evidence parts of the constitution of the Grand Lodge of Indiana, and other laws, rules, and regulations of the Order of Knights of Pythias, together with the charter and articles of incorporation of appellee, and the charter issued to appellant by the grand lodge. It is shown that Koerner Lodge No. 6 was organized at the city of Indianapolis, Indiana, in 1869, pursuant to authority from the supreme lodge; that subsequently a charter was granted to it by the Grand Lodge of Indiana. Prior to 1892, it was permitted to print its constitution and other laws in the German language, and the minutes of its meetings were kept and recorded in that language, and a German ritual was used in conferring the degrees of the order, for the reason that many of its members did not understand the English language. In 1892 the supreme lodge enacted a law requiring that the rituals used by all lodges, and the other work thereof, should be in the English language. Among the provisions of the constitution and laws of the grand lodge for the government and control of subordinate lodges are the following:

“Sec. 3. When a lodge is suspended or dissolved it shall be the duty of its last chancellor commander and all other officers to deliver up its dispensation or charter, books, jewels, funds, emblems, regalia and all other property and effects, together with a list of all

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members of said lodge in good standing at the time of its dissolution, to the grand chancellor or his deputy, and if any officer or member having custody of any part of said property or effects refuses to surrender the same, he shall forever be excluded from the membership of the order.

“Sec. 4. Any lodge may voluntarily surrender its charter by a vote of the lodge, provided there are less than seven members who are willing to continue.

“Sec. 5. All funds and effects received by the grand lodge from a dissolved or suspended subordinate lodge, shall be held by the grand lodge for a period of one year, and in case said subordinate lodge shall be reinstated within one year, said funds and effects shall be restored to said subordinate lodge, on payment by said subordinate lodge of the actual expenses incurred in obtaining possession, shipment, care and custody of said effects. And in case such subordinate lodge shall not be reinstated within one year after its dissolution, then the grand lodge may sell and dispose of the effects of said subordinate lodge, and all money and effects received from such lodge shall become the absolute property of the grand lodge.

“Article 1, Sec. 24. All lodges working under a charter of this grand lodge shall enforce a strict adherence to the work of the order according to the forms furnished by the Supreme Lodge, Knights of Pythias of the World, and the Grand Lodge of Indiana; and they shall neither adopt nor use any other charges, lectures, rank work, form of installation ceremonies, nor regalia or jewels than those prescribed by the ritual and law of the supreme lodge and provided by the grand lodge.”

A rule of the supreme lodge, adopted in 1872, which is also incorporated into the constitution of ap-pellee, provides as follows:

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“No subordinate lodge shall be allowed to dissolve or surrender their charter by their vote as long as nine members remain willing to sustain the lodge, except by permission of the grand lodge, or during the recess of the grand lodge, by the grand chancellor of the jurisdiction.”

There are other laws of the grand lodge in evidence providing that no subordinate lodge shall be less than seven members, and that seven members present at a meeting shall constitute a quorum for the transaction of business.

On September 8, 1894, the keeper of the records and seal of appellant mailed to each of the members thereof a postal card, notifying him to be present at the lodge hall on Monday evening, September 10, 1894, stating therein as follows: “To consider a question on which the existence of the lodge depends. If you have any interest in the welfare of the lodge you certainly will be present.”

On September 10, 1894, it appears that appellant was composed of 160 members, and at a regular meeting, held on the night of that date, at its hall in the city of Indianapolis, at which about sixty members were present, a certain resolution relative to the lodge severing its connection with the order was by those present unanimously adopted. It is apparent from the recitals in the preamble to this resolution that the members present on this occasion were indignant and felt aggrieved by reason of the action of the supreme lodge and the report of the supreme chancellor relative to German lodges of the order. The following is the resolution adopted at this meeting:

“Resolved. 1st. That Koerner Lodge No. 6 sever connection with the Order of Knights of Pythias.

“2d. That we do not impair the right of our members belonging to the endowment rank.

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“3d. That we turn over our entire property to the German Mutual Aid and Benefit Society of Indiana.”

Albert R. Holland, a witness in behalf of appellee, testified in substance that he was janitor of the hall and was acting as outer guard at the meeting in question, and that after the lodge had adjourned some three or four of the members came out of the hall and said to him, “We have quit, we give up,” and one of them handed to him the lodge’s charter and told him to give it to Mr. Bowers, who was then the keeper of the records and seal of the grand lodge; that the charter had been hanging in the lodge room before it was taken down by some one and turned over to him; that he put it in one of the rooms connected with the hall and reported to Mr. Bowers, and “after a day or so,” at the request of the latter, witness delivered the charter to Bowers the grand keeper of records and seal. The latter testified that on Wednesday after the meeting, being September 12, he went to the lodge room of the appellant, that the charter at that time was in the ante-room, and that he directed Holland, the janitor, to bring it to his office, which he did, and that it has remained there since that time; that when Schmidt, a member of the lodge, demanded possession of it he declined to comply with the demand. This, in the main, was all the evidence introduced by appellee tending to show the dissolution of Koerner lodge and the surrender of its charter.

To rebut the evidence of appellee upon the point that the charter had been surrendered, appellant introduced seven witnesses, who were members and present at the meeting on September 10, to-wit: William Brandt, the chancellor commander; John Weber, the vice chancellor; August Woerner, master of finance; Henry Zimmer, Gustav Pink, Charles Pink, Charles J. Schmidt and Michael Speer.

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The substance of the testimony of these witnesses is as follows: After the meeting of September 10 had adjourned, William Brandt, the chancellor commander and presiding officer, left the hall, the charter then hanging in its usual place on the wall, and while the members were getting ready to leave, some being already in the ante-room, Henry Zimmer, who was not then an officer of the lodge, without any direction from any one, took the charter from its accustomed place and handed it to John Weber. At the same moment August Woerner, the master of finance, stepped up and said, "Here, this charter stays here; we are not going to take the charter along." They tried to hang it on the wall again, when Woerner remarked that they need not mind; that "Al." (Holland, the janitor) had a stepladder, and he would hang it up again. Weber then took it and set it up on the stage back of the vice chancellor's chair, where it remained after all the members had left the hall, the last to leave being Weber, Koerner, Speer, William Dehue and Hugo Klingstein. At the meeting of September 24, 1894, Charles J. Schmidt was appointed a committee to see Bowers about the charter. He saw Bowers, who told him that the charter was in his possession and that he did not like to give it up during the pendency of the suit, but that it was immaterial whether the lodge had its charter or not; that it was not suspended and could go ahead with its meetings "and everything would be forgotten, or something to that effect."

There was evidence introduced tending to show that the minutes of proceedings had at a lodge meeting were usually read for approval at the next meeting, and that those of September 10, 1894, were not read or approved at that meeting, but were read for the first time on September 24.

The contention of counsel for appellant, in the lower

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court, was that at the meeting held on September 10, the members present became excited over the action of the supreme lodge in depriving them of the use of German rituals, and also in regard to a report made by the supreme chancellor which they considered as an insult to the German members of the order, and under this excitement they did adopt the resolution in controversy; that the trustees did not in fact resign nor was any of the appellant's property turned over to the German Mutual Aid Society, but said property is still held by the trustees of the lodge, who are co-appellants in this appeal. Appellant offered evidence to prove that on September 24, 1894, being the night for a regular meeting of Koerner lodge, it again assembled at its regular place of meeting, all of its officers and forty-six members being present. That after certain corrections were made in the minutes of September 10, 1894, they were finally adopted as corrected. That the meeting of September 24 was opened in due form in accordance with the constitution and laws of the order, and that it proceeded to the transaction of its usual business. That at this meeting the minutes of September 10 were read for the first time, and that they were not approved as originally written, and that certain erasures appearing in the minutes of September 10, as introduced by appellee, were made by the order of the lodge at the meeting of September 24 for the purpose of correcting the minutes of the former proceeding. The proceedings of the meeting of September 24 were recorded in the same record containing the minutes of September 10. At the meeting of September 24 it appears by the offered evidence that Mr. Schmidt, one of the members present, was appointed a committee to see Bowers and have the charter returned to the lodge room. Appellants, also, offered to show that at this meeting eleven

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members then present, but who were not present on September 10, filed and had recorded their written protest against the action of the lodge in attempting to sever its connection with the order. This protest is as follows:

“The undersigned, members of Koerner Lodge No. 6, Knights of Pythias of Indiana, who were not present at the meeting of said lodge on Monday night, September 10, 1894, hereby protest against the action taken by the members of said Koerner Lodge No. 6 on said evening, whereby they resolved to sever the connection of said lodge with the Order of Knights of Pythias.

- | | |
|---------------------|------------------------|
| 1. FRED RASEMAN. | 6. GEO. SCHOPPENHORST. |
| 2. WILLIAM RATHORT. | 7. WOLF MORRIS. |
| 3. JOHN KOEPPEN. | 8. ABRAHAM MARX. |
| 4. CHAS. ALBRECHT. | 9. GOTTLIEB DIPPEL. |
| 5. HENRY MILLER. | 10. WM. SOGEMEIER. |
| 11. HENRY SCHAUB.” | |

All of the above evidence offered by the appellants was, over their exceptions, excluded by the court, and the court also refused to permit the appellant to introduce the record of a meeting of October 1, 1894, which was held on the regular night and at the regular place of meeting.

If, under the evidence given, it can be said that before the commencement of this suit Koerner lodge had dissolved and surrendered its charter, and ceased to longer exist as a working lodge, this result must be attributed solely to the action of the minority of its membership in adopting the resolutions on September 10, 1894. In the absence of this certainly it can not be asserted that there is other evidence sufficient to show that the lodge as a body had invested Holland, the janitor, with authority to surrender its charter, or that Bowers, in his official capacity, had

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any warrant to accept and retain it. It is also shown that the minutes of the meeting of September 10 were not made up, read, corrected and approved until the meeting in controversy on the 24th inst. Appellants offered to show that at this meeting the minutes of the previous one were read for the first time, and that certain corrections were made therein relative to the proceedings on September 10 upon the resolution in dispute. At this meeting, it appears from the evidence offered and excluded, that eleven members who were not present on September 10 entered and had recorded their protest against the action of the lodge taken at the previous meeting. Under the provisions of the constitution of the grand lodge and the laws of the supreme lodge, which govern and control the action of a subordinate lodge, it is disclosed that the latter may surrender its charter when there are less than seven of its members who are willing to continue, and a subordinate lodge is also prohibited from dissolving or surrendering its charter so long as nine of its members are willing to sustain it, except by permission of the grand lodge, or by permission of the grand chancellor during a recess.

There is no claim that appellant had been dissolved by virtue of any action or proceedings had by the grand lodge in accordance with its constitution or other canons of the order prior to the beginning of this suit, but the adoption of the resolution is relied upon as *ipso facto* effecting a dissolution of Koerner lodge, and thereby giving the former, under its constitution, the right to the possession of its property, regardless of any subsequent action of the lodge, or of nine or more of its members in opposition to the alleged dissolution.

The authorities affirm that a beneficial association may be dissolved in the manner provided in its charter

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or constitution, and in the absence of any provision on the subject it cannot voluntarily be dissolved except by the unanimous vote of its members. Am. and Eng. Ency. of Law, Vol. 2, p. 178.

We are of the opinion that the subsequent action of the Koerner lodge, at the meeting of September 24, as offered to be shown by the appellant, was, under the circumstances, proper and legitimate.

It appeared that the minutes of the meeting of September 10 were first read and presented for approval at the meeting on September 24, and the offer was to show that certain corrections in regard to the proceedings had at the former meeting were then made. The meeting of September 24 seems to have been the first opportunity for the lodge to avail itself of the right to correct the record of the former meeting so as to make it conform to what had actually occurred. Again, it appears that this meeting was also the first opportunity which the eleven members who were absent on September 10 had to protest and object to the action of the minority of the lodge's membership at this latter meeting.

As we have seen, the laws of the order forbid a voluntary dissolution or surrender of a lodge's charter in the event there are nine members willing to continue the organization. The policy or purpose of this rule manifestly is to prevent a dissolution of a subordinate lodge unless it be effected as near as practicable by unanimity upon the part of its members. If there are nine or more loyal ones, who are willing to sustain their organization as a lodge, and continue its existence and operations in obedience to the rules, regulations and laws of the order, then a voluntary dissolution of the lodge, as such, cannot result, even though it be the will and desire of a large majority of its members, except by the permission of the grand

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lodge or its chancellor. This must be true if any controlling force or effect in this respect is to be given to the particular rule or law in question. This is a vital point in the case at bar, for if it is shown that these eleven protesting members are willing to sustain and continue the existence of their lodge, then it is evident, we think, that the vote of its members at the meeting of September 10 upon the adoption of the resolution in controversy could not *ipso facto* result in its dissolution or work a surrender of its charter. The evidence relative to the action taken by these protesting members, therefore, was very material in order to show, in consideration of the rule to which we have referred, that the action of the lodge, relied upon by the appellee, had not actually effected a voluntary dissolution and disbandment, as claimed by the appellee, and upon which it bases its right to the money and property involved. It would seem that nine members, the number designated by the law, being in excess of a quorum and also of the number required to constitute a lodge, would still continue the organization of the lodge and entitle it to hold its property and effects, notwithstanding the act of those, in deciding to withdraw or sever their fraternal connections. See *Gorman v. O'Connor*, 155 Pa. St. 239, 26 Atl. 379; *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 868; *Chamberlain v. Lincoln*, 129 Mass. 70.

The stockholders of a corporation which is chartered or organized under the laws of a State, as a general rule, cannot effect a voluntary dissolution except by a unanimous vote. Beach on Private Corporations, Vol. 2, section 781; Cook on Stockholders and Corporation Law, section 629.

That part of the resolution which declared in favor of turning appellants' property over to the German Mutual, etc., Society was *ultra vires*, and would not

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warrant or justify its trustees and officers in carrying it into effect. The authorities fully affirm and sustain the doctrine that appellant's members had no right or power to divert the funds and property of their lodge from the source or specified purposes to which, under the rules and laws of the order, the same had been dedicated. Niblack on Accident Ins. and Benefit Societies, section 121; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; Bacon on Benefit Societies, section 39; *State Council, etc., v. Sharp*, 38 N. J. Eq. 24; *Altmann v. Benz*, 27 N. J. Eq. 331; *Grand Lodge K. of P. v. Manhattan Sav. Inst.*, 34 N. Y. Supp. 253.

We are of opinion that the court erred in excluding the evidence herein indicated as offered by the appellant, and the final judgment is therefore reversed, and the cause remanded, with instructions to the lower court to grant appellants each a new trial, and for further proceedings in accordance with this opinion, the restraining order to remain in force until the further order of the lower court.

COY v. THE INDIANAPOLIS GAS COMPANY.

[No. 17,998. Filed January 29, 1897.]

NATURAL GAS.—Duty of Company to Furnish.—Breach of Contract with Consumer.—Tort.—A natural gas company that has received a franchise to lay its pipes in the streets of a town and supply gas to the citizens thereof, owes a duty to serve all persons who make proper application for such service, and comply with such reasonable rules as may be fixed, and make such reasonable compensation as may be required; and where a contract has been entered into between such company and a consumer, such contract being but a statement of the reasonable conditions under which the company was required to perform its duty, the failure on the part of the gas company to perform such contract is a tort.

DAMAGES.—Action in Tort.—Scope of Damages.—Proximate Cause.—In an action in tort all damages directly traceable to the wrong done and arising without an intervening agency and without fault of the injured party are recoverable.

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SAME.—Complaint.—Sufficiency Of.—Death from Failure of Gas Company to Supply Fuel.—Proximate Cause.—A complaint against a natural gas company engaged in furnishing gas, and which had contracted to supply plaintiff with gas for fuel, which alleges that defendant failed and refused to supply plaintiff with gas during cold winter weather, and after receiving notice from plaintiff of its failure to supply gas and of plaintiff's inability to procure fuel elsewhere, and of the sickness of his children, and which alleges that as a result of such failure plaintiff's house became cold and his children who were sick took a relapse from such sickness and died, is sufficient against a demurrer, and such failure on the part of defendant to supply fuel is held to be the proximate cause of the relapse and death of plaintiff's children.

From the Marion Superior Court. *Reversed.*

Samuel Ashby, for appellant.

Miller, Winter & Elam, for appellee.

HOWARD, J.—The sole error assigned on this appeal is that the court sustained a demurrer to appellant's complaint and to each of its two paragraphs.

It is alleged in the first paragraph of the complaint that the appellee is a corporation possessed of certain powers, immunities and franchises, among which are the right to lay pipes for the supply of natural gas in the streets and alleys of the town of Haughville, and the exclusive right to adjust, supply and handle all such pipes, together with mixers, repairs, connections and appliances necessary in supplying natural gas to consumers, and the exclusive right to manage, furnish, control and measure the supply of natural gas flowing through such pipes and other appliances to its various consumers in said town. That said consumers have no right in any way to interfere with or molest any of said pipes, connections, machinery or other appliances, or in any way to regulate, manage or control the flow of natural gas through any of said pipes, mixers or connections; that by reason of its said exclusive rights and franchises the appellee owed and owes a corresponding duty to appellant, with whom

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it entered into contract relations to supply him with gas for fuel promptly and without reserve; and, by reason of such contract and exclusive rights of appellee to supply such gas, the appellee was in duty bound to supply the same to appellant, and its failure so to do, as hereinafter stated, was and is wrongful and unlawful and in violation of express duty due to appellant and to his family; that by reason of such contract relations a duty was and is created and is imposed by law upon appellee to supply such gas to appellant upon the performance by him of the conditions of said contract on his part to be performed; that at the time of entering upon said contract appellee knew that said gas was a necessity and essential to the life of appellant and his family, and knew that appellant could not obtain gas or fuel elsewhere, but depended entirely upon appellee to supply the same; that at the time of entering into the agreement to furnish gas as aforesaid appellee was the owner of and operating a natural gas plant in said town of Haughville, under the laws of the State, and engaged in the business of supplying natural gas for light and fuel to appellant, to divers other persons, and to the public of said town; that in December, 1892, appellee entered into a written contract with appellant to furnish his residence in said town with gas, at an agreed price, and on the terms and conditions stated in said contract, in sufficient quantity for fuel to heat said residence, appellant paying for said gas in advance and agreeing to notify appellee of any defect in such service and supply of gas; that in December, 1892, appellant's family consisted of himself, his wife and their two children, all living in his said house in said town, one of said children, Lou Ethel Coy, being then of the age of five years; that in violation of said contract, and in

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violation of its duty to appellant, appellee wholly failed, refused and neglected to supply said gas, and wholly failed, neglected and refused to perform the conditions of said contract on its part to be performed, and wrongfully and unlawfully failed, neglected and refused to discharge its said duty of supplying gas to appellant, and, in violation of said duty imposed by law and by said contract, wrongfully and unlawfully left appellant without fuel with which to heat said dwelling, all of which wrongful acts were done while said contract was in full force and while said duty rested upon appellee towards appellant to supply said natural gas. That appellant, relying upon appellee to comply with its said contract, and believing that appellee would discharge its said duty to appellant, failed to procure wood, coal, gas or other fuel; that during the severe weather in the latter part of December, while said contract was in full force, while said duty existed, and while appellant relied upon appellee to perform said contract and discharge said duty, and while appellant was unable to procure any other fuel to heat his dwelling, his said child, Lou Ethel Coy, being sick in said house, and after appellant had given to appellee due notice of its failure to supply gas to appellant, and of his inability to procure fuel elsewhere, and of the sickness of said child, and demanded such supply of gas from appellee, and after appellant had made every effort to procure fuel elsewhere, and while he was unable to obtain the same after diligent search, the dwelling of appellant became so cold and thoroughly chilled by the want of heat, that said Lou Ethel Coy, without her fault or that of appellant, and by reason of the failure of appellee to furnish gas, and by reason of the wrongful and unlawful refusal and failure of appellee to discharge its said duty to appellant, and by reason of the chilled condition of said

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house and the low temperature therein, took a relapse in her sickness for want of heat and warmth, and became very ill and lingered in severe sickness in consequence thereof until the 31st day of December, 1892, when she died; the extreme sickness and death of said child being the immediate, direct and proximate result of the failure of appellee to supply said gas and of its refusal to discharge its said duty to appellant.

The second paragraph of the complaint is similar to the first, except that it counts on damages for the death, in like manner, of the other child of appellant.

Counsel differ as to whether the action disclosed in the complaint is one on contract or in tort. It is true, as a general rule, that no one is compelled to do business with any but those with whom he chooses. There are, however, well recognized exceptions to this rule. It has always been held that common carriers cannot, on tender of the usual compensation, refuse to accept for transportation proper articles offered at proper times and places. So, also, innkeepers having accommodations must receive as guests all who, in a peaceable and proper manner, make application therefor. In like manner it has been held that telegraph, telephone, water, gas and other like companies, that have received from public authority franchises which also provide for the accommodation of the general public, owe a duty to serve all persons who make proper application for such service, and who comply with such reasonable rules as may be fixed, and make such reasonable compensation as may be required. Persons or corporations enjoying such public franchises, and engaged in such public employment, are held, in return, to owe a duty to the public, as well as to all individuals of that public who, in compliance with established customs or rules, make demand for the beneficial use of the privileges and advantages due to

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the public by reason of the aid so given by public authority. *Cent. U. Tel. Co. v. Fehring, ante*, 189; *Portland Nat. Gas & Oil Co. v. State, ex rel.*, 135 Ind. 54; *City of Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, and note to this case in 15 L. R. A. 321. And that the public grant to appellee imposed also a public duty in return. See further the recent case of *Westfield Gas and Milling Co. v. Mendenhall*, 142 Ind. 538, and cases there cited.

In *Portland Nat. Gas Co. v. State, supra*, it was said: "That a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of *mandamus*."

So it was said in *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236, that, "When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it imposed upon itself the duty to supply the house and premises, upon reasonable terms and conditions, with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business."

And the Supreme Court of the United States, in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, said: "It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the

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public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality, and in such quantity as the public needs demanded."

The same high court, in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, said: "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."

In 2 Beach. Priv. Corp., section 835 (d), the author says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected. It may, however, impose reasonable conditions."

In the case at bar, the arrangements and reasonable conditions referred to in the cases cited, were all provided for by the contract between the parties. The agreement so entered into did not in any manner absolve appellee from the duty assumed under its franchise, but rather by its terms fixed the character and scope of the duty so assumed. Even without and before the contract, it was the duty of the company to attach its mains to appellant's house pipe, on being requested to do so by him, and on his compliance with the reasonable conditions imposed by the company. Nor would it be enough to make such connections without also supplying the gas therefor. Not a partial, but a full compliance with the company's duty is

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required, and this without any discrimination as to persons having a right to the gas. *Cent. U. Tel. Co. v. Fehring, supra*. Whether, particularly after contract entered into to supply the gas, the company might be relieved of the obligation to furnish it, by reason of inability to procure the gas or for other reason, we need not decide, as no such question appears in the record. That, besides, would be matter of defense, and could not be taken into account in determining the sufficiency of the complaint. *Portland Nat. Gas and Oil Co. v. State, supra*.

The failure of duty on the part of the company, as alleged in the complaint, is a tort, even though the complaint also shows a failure to comply with the contract. The contract was but a statement of the reasonable conditions under which the company was required to perform its duty. The authorities show that in such a case the action may be on contract or in tort, the necessary statement of facts being substantially the same in either case. The failure to perform such a contract is in itself a tort. The action in this case is therefore in tort. 2 Addison Contracts, *1119; Cooley Torts, *90, *91; *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474; *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Brown v. Chicago, etc., R. W. Co.*, 54 Wis. 342, 11 N. W. 356, and authorities cited in these cases.

The chief objection made to the complaint is, that the damages sought to be recovered are too remote.

In actions on contract, as said by counsel, the damages that may be recovered for a breach of the covenants and conditions are, (1) those that result from the usual, natural, and probable consequences of the breach, and which, therefore, the parties may be thought to have had in mind when they entered into the contract; and (2) special damages referred to in the

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contract, and which actually occur, although not such as might naturally and probably be expected to arise out of a breach of the contract. It is to be observed that such special damages are also in contemplation of the parties in making the contract, as well as the damages of the first class which naturally flow from a violation of the contract. The difference is, that damages naturally arising from a breach of the contract need not be mentioned in the agreement made, but will be presumed to have been in contemplation of the parties, whereas special damages, or those not naturally or usually arising from a breach of the contract, though contemplated by the parties, must be specially referred to in the contract itself.

Whether the loss to appellant by the sickness and death of his children might be considered as the natural and probable result of a breach of appellee's contract to furnish gas for fuel during the cold weather in the latter part of December, 1892, we need not consider, inasmuch as the action here, as we have seen, is in tort, the contract being but a statement of the reasonable conditions under which appellee was to furnish the gas, in discharge of the duty owed by it to appellant.

The rule as to recovery of damages for tort differs in some respects from that which obtains in case of simple breach of contract. All damages directly traceable to the wrong done, and arising without an intervening agency, and without fault of the injured person himself, are recoverable. The wrong in such cases is said to be the proximate cause of the injury.

"In an action for a tort," says Mr. Sutherland, in his work on Damages (2d ed.), section 16, "if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might

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reasonably have been expected to follow from the circumstances; such as according to common experience and the usual course of events might have been reasonably anticipated. The damages are neither limited nor affected, so far as they are compensatory, by what was in fact in contemplation by the party in fault. He who is responsible for a negligent act must answer 'for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. Whether the injurious consequences may have been "reasonably expected" to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. * * * It is the unexpected rather than the expected that happens in the great majority of the cases of negligence.' Mr. Wharton says that a man may be negligent in a particular matter 'a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defense that a particular injurious consequence is "improbable," and "not to be reasonably expected," if it really appear that it naturally followed from the negligence under examination.' * * * There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. * * * The law is practical, and courts do not indulge

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refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties. Hence, if the defendant's negligence greatly multiplied the chances of accident, and was of a character naturally leading to its occurrence, the possibility that it might have happened without such negligence is not sufficient to break the chain of cause and effect. An act of negligence will be regarded as the cause of an injury which results, unless the consequences were so unnatural and unusual that they could not have been foreseen and prevented by the highest practicable care." Citing *Stevens v. Dudley*, 56 Vt. 158; Wharton on Neg., sections 77, 78; *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117; *Reynolds v. Texas, etc., R. W. Co.*, 37 La. Ann. 694; *Louisville, etc. R. W. Co. v. Lucas*, 119 Ind. 583.

And in the well considered case of *Brown v. Chicago, etc., R. W. Co.*, *supra*, citing numerous authorities, the court said: "The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."

Taking the allegations in the complaint before us as true, the relapse in sickness and the death of appellant's children were the direct consequences of the failure of appellee to supply the fuel necessary to warm his home. One of the conditions under which the gas was to be supplied was that "upon any defect

therein or thereto," appellant should give notice to appellee. It is alleged that "during the severe weather," after appellant had given to appellee "due notice of its failure to supply gas to plaintiff [appellee], and of his inability to procure fuel elsewhere, and of the sickness of said child," and after appellant had made every effort, but been unable, to procure fuel, the house became so cold that his children grew worse and soon after died by reason of the low temperature. Counsel for appellee argue that these and other allegations cannot be true. If they are true, however, and that they are true is admitted by appellee's demurrer, then the liability of appellee becomes evident, unless it can be shown that it was impossible to furnish the gas for reasons showing appellee to be wholly without fault, or because of some fault on the part of appellant, none of which are disclosed in the complaint. It cannot be said, in view of the authorities, or from reason itself, that a natural gas company, occupying the streets and alleys of a city or town by virtue of a franchise granted for that purpose, may, at its pleasure, give or withhold the fuel at its disposal and which may be the means necessary for the comfort, health, or even life of the inhabitants. Nor can it be said, from anything appearing in the complaint, that appellee's failure to supply the gas during the cold weather of December may not have been, as alleged, the proximate cause of the relapse in sickness and the death of appellant's children. The allegation is specifically made; and while it was suggested in argument that independent intervening causes might have brought about the severe sickness and death of the children, yet that is a question for the jury. So also is the suggestion as to whether appellant might in fact have procured other fuel in time to prevent the fatality complained of.

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It is by no means an impossibility, or even an improbability, that the sickness and death of the children may have been directly due to the failure of appellee to supply the needed gas for fuel in the severe winter weather; and this failure may have come without warning to appellant and so as to give him no means or opportunity to obtain other fuel in time to save his children.

In *East Tenn., etc., R. R. Co. v. Lockhart*, 79 Ala. 315, it was said: "The plaintiff was sick at the time she was turned off the train. It may be said the conductor was ignorant of her physical condition. Ignorance, in such case, is no excuse, and the defendant is responsible, as if he had full knowledge of the fact. Evidence of her ailment is admissible, not as an element of damages, but as tending, in connection with other circumstances, to show the connection between the subsequent aggravation of the sickness and the wrongful act."

And, in *Brown v. Chicago, etc., R. W. Co.*, *supra*, it was insisted that the damages claimed for the sickness of the injured party, and for medical attendance and care, were "too remote to constitute a cause of action, and that it was error on the part of the court below not to take that part of the case from the jury." But the insistence was denied, and it was held that the question as to whether the sickness was or was not the proximate result of the wrong done, was one for the jury. It is only when all the facts are found or agreed to that the conclusion as to what was the proximate cause of a given injury is a question of law.

Even an aggravation of existing sickness may make the wrongdoer liable. "If the negligence of a carrier," says Mr. Sutherland, *Damages*, section 36, "results in an injury to a passenger by which his system is rendered susceptible to disease and less able to resist it

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when he is attacked by it, and death results, the injury is the proximate cause thereof, although the disease is to be regarded as an intervening agency, and the malady which attacked him was prevalent in the community." Citing *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346.

We are satisfied that the complaint is sufficient.

The judgment is reversed, with instructions to overrule the demurrer to the complaint and to each paragraph thereof.

MC COY ET AL. v. STOCKMAN ET AL.

[No. 18,072. Filed January 29, 1897.]

PRACTICE.—Special Appearance.—When Amounts to General Appearance.—When a motion is filed under a special appearance, to strike out a cross-complaint for want of process against the plaintiff, and for other reasons which are such as must be taken advantage of by demurrer or answer, the filing of such motion constitutes a full appearance equivalent to the service of process.

SAME.—Motion to Strike Out Cross-Complaint for Want of Sufficient Facts.—It is error to strike out a cross-complaint on the ground that it does not state facts sufficient to constitute a cause of action.

SAME.—Motion to Strike Out Cross-Complaint on the Ground That Complainants are not All Parties to the Action.—Where a motion is made to strike out a cross-complaint in which several defendants join, on the ground that some of them are not properly parties to the action, it is not error to refuse to strike out such a motion when such objection does not apply to all the parties.

ELECTION OF REMEDIES.—Estoppel.—When a party joins in a complaint as plaintiff, and by leave of court dismisses his complaint in order to join in a cross-complaint as a defendant, it does not amount to a conclusive choice or election of remedies so as to estop him from becoming defendant and setting up matters involved in his cross-complaint.

From the Decatur Circuit Court. *Affirmed.*

Ewing & Wallingford and *Moore & Miller*, for appellants.

Ewing & Wilson, *Bennett & Davidson* and *D. A. Myers*, for appellees.

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MCCABE, J.—The appellants and a large number of others filed a complaint against appellee, Stockman, as a warehouseman and grain merchant, and others interested, seeking to obtain possession of the wheat he had in store and to make a division thereof among the plaintiffs. It was alleged that the plaintiffs and the defendants, other than Stockman, had deposited 13,000 bushels of wheat with Stockman, and on his financial failure he had only about 5,000 bushels. Nine of the plaintiffs, with the permission of the court, dismissed the cause as to themselves, namely, George Bird and others, over the objection and exception of the other plaintiffs.

The dismissing plaintiffs applied to the court to be made defendants, which application was granted. They then joined with the original defendants in a cross-complaint against the remaining original plaintiffs, claiming certain rights in the stored wheat.

The defendants to the cross-complaint entered a special appearance to said cross-complaint and moved to strike it out for the reasons: (1) That the defendants in said cross-complaint are not in court by any process to answer the same; (2) that said cross-complaint involves a commingling of jurisdictions and incongruity of actions; (3) said defendants elected to join the plaintiffs in the original complaint, and allege they were tenants in common with all the plaintiffs in the wheat in controversy.

The court overruled the motion. The original plaintiffs answered said cross-complaint in two paragraphs, and the circuit court sustained a demurrer to the second paragraph thereof. The only errors assigned call in question the rulings above mentioned. The error assigned, that the court erred in rendering final judgment in favor of the cross-complainants, if it were even a sufficient assignment of error to present any

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question of law, it is waived by appellants' counsel in not mentioning it in their brief.

We need not determine whether process was necessary to bring the defendants to the cross-complaint into court, as under their so called special appearance they moved to strike out the cross-complaint, not only for want of process, but for other reasons assigned in such motion.

A motion under a special appearance to quash the notice and set aside the order appointing a receiver was held to be taking a step in the cause, and therefore a full appearance, in *Hellebush v. Blake*, 119 Ind. 349.

The other reasons assigned in the motion were such as must be taken advantage of by demurrer or answer, and either a demurrer or answer filed constitutes a full appearance. *Knight v. Low*, 15 Ind. 374; *City of Crawfordsville v. Hays*, 42 Ind. 200; *Slauter v. Hollowell*, 90 Ind. 286; *Gilbert v. Hall*, 115 Ind. 549.

A full appearance is equivalent to the service of process and waives all defects therein. *City of Crawfordsville v. Hays*, *supra*; *Louisville, etc., R. W. Co. v. Nicholson*, 60 Ind. 158.

The second and third reasons or grounds of the motion, as before remarked, involved either grounds for a demurrer to the cross-complaint or an answer thereto, if indeed they state any matter the appellants had any right to urge against the cross-complaint, either by way of demurrer or answer. Even though the cross-complaint stated no cause of action against appellants, that circumstance furnished no ground for striking it out. It is well established in this State that it is error to strike out a complaint on the ground that it does not state facts sufficient to constitute a cause of action. *Port v. Williams*, 6 Ind. 219; *State, ex rel., v. Newlin*, 69 Ind. 108; *Indianapolis Piano Mfg.*

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Co. v. Caven, 53 Ind. 258; *Fletcher v. Crist*, 139 Ind. 121.

The reason of the rule is, that if the facts stated are not sufficient to constitute a cause of action the plaintiff has a right to amend his complaint so it will state a cause of action. This he could not do if the pleading was stricken out. The same rule applies to a cross-complaint.

Another reason stated in the motion to strike out the cross-complaint, if it had been true in fact, would have presented a very different question. That reason is the fourth, namely: "That said complainants are not parties to this action, being neither plaintiffs nor defendants, they having dismissed and withdrawn their original suit, and now have no standing in the court authorizing them to plead the matters set forth in said cross-complaint." The court having granted their application to be made parties defendant, as the record shows, the ground stated has no foundation in fact. Moreover, a part of the cross-complainants were original defendants in the action. There was no error in overruling the motion to strike out the cross-complaint, even if the nine dismissing plaintiffs had no right to and did not become defendants.

The second paragraph of the answer to the cross-complaint is in substance as follows: Said defendants, for further answer to said cross-complaint, say that the following named plaintiffs in said cross-complaint, then naming nine of them, were plaintiffs in the original complaint filed in this cause, and they, with full knowledge of all the facts alleged in said complaint and cross-complaint, and with full knowledge of the facts that Henry C. Stockman had been engaged for years in buying, selling, and storing wheat, and in dumping, mingling, and storing wheat in one general warehouse, kept by him for that purpose, and well knowing that the said Stockman was

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insolvent, and knowing that he had on hand only 5,000 bushels of wheat to satisfy deposits of 13,000 bushels, and knowing that he had been in the habit of shipping stored wheat and buying wheat to replace it, and with full knowledge of all these facts, the said cross-complainants deposited their wheat on the same general terms and conditions of all other depositors, and at the time of bringing of this action, the said cross-complainants elected to join with the original plaintiffs and asked to recover with them as tenants in common, and asked for the appointment of a receiver herein, and continued as plaintiffs until the day of the appointment of such receiver, when they dismissed as plaintiffs over the objection of these plaintiffs. Wherefore the plaintiffs say that said cross-complainants are estopped to plead the matters set forth in said cross-complaint, and they ask judgment accordingly. The ground on which appellants seek to uphold the sufficiency of this answer is that it shows that the cross-complainants were estopped or concluded by their election of remedies in joining in the original complaint.

But if all the cross-complainants had originally joined in the complaint and had dismissed and become defendants by leave and order of court, as a part of them did, it would not have amounted to a conclusive choice or election of remedies so as to estop them from becoming defendants and setting up the matters involved in their cross-complaint. This is settled by the recent case of *Cohoon v. Fisher*, ante, 583, and cases there cited.

The circuit court did not err in sustaining the demurrer to the said second paragraph of the answer to the cross-complaint.

Judgment affirmed.

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THE HOME ELECTRIC LIGHT AND POWER COMPANY v.
THE GLOBE TISSUE PAPER COMPANY.

[No. 17,746. Filed February 2, 1897.]

INJUNCTION.—*Appeal from Interlocutory Order Overruling a Motion to Dissolve.*—*Sufficiency of Complaint.*—A complaint for injunction first attacked on appeal from the court below for refusal to dissolve a temporary restraining order, need not make out a case which would entitle the plaintiff to relief at all events at the hearing, but will be sufficient if the facts averred show a proper subject for investigation in a court of equity. p. 679.

AFFIDAVITS.—*Conflicting Affidavits Read in Evidence.*—This court on appeal from an interlocutory order overruling a motion to dissolve an injunction will not determine the weight of conflicting affidavits given in evidence in the court below at the hearing thereof. p. 679.

RECORD.—*Bill of Exceptions.*—*Interlocutory Order.*—In an appeal from an interlocutory order overruling a motion to dissolve an injunction, the complaint, answers, and interlocutory order belong to the record proper without a bill of exceptions. p. 681.

BILL OF EXCEPTIONS.—*When Contains Matter Belonging to Record Proper.*—The office of the bill of exceptions is to bring into the record matters which do not belong to the record proper; and when the bill of exceptions embraces matter which should be in the record proper, the law does not require a consideration thereof on appeal, unless some statute so specially provides. p. 681.

From the Elkhart Circuit Court. *Affirmed.*

J. S. Dodge, O. Z. Hubbell, J. M. Van Fleet and V. W. Van Fleet, for appellant.

Chamberlain & Turner, Baker & Miller and Osborne & Zook, for appellee.

MCCABE, J.—The appellee sued the appellant to enjoin it from doing certain acts and asking a temporary restraining order until the final hearing. The trial court granted a temporary restraining order until the

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166 84
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final hearing, and afterwards the defendant moved to dissolve the same, and affidavits were read in support of and against the right of the plaintiff to such an order.

The motion to dissolve was overruled, and from this interlocutory order this appeal is prosecuted. Burns' R. S. 1894, section 658 (R. S. 1881, 646).

The errors assigned call in question the sufficiency of the facts stated in the complaint to constitute a cause of action for an injunction, or warrant relief by way of injunction, and the action of the circuit court in overruling appellant's motion to dissolve the restraining order, in granting the injunction upon the evidence and in overruling appellant's motion to modify the judgment. We presume counsel mean to say, overruling appellant's motion to modify the restraining order, as there was no judgment, and their motion to modify was not to modify the judgment, but to modify the restraining order.

The substance of the complaint is, that the plaintiff, the Globe Tissue Paper Company, is a corporation organized under the laws of the State of Indiana, engaged in the manufacture of paper by water power, and has been so engaged for many years prior to May 29, 1891; that on said day, the St. Joseph Hydraulic Company, a corporation, was the owner of an undivided third of the water power of the St. Joseph river, furnished and produced by reason of a dam constructed across said river in the city of Elkhart by the Elkhart Hydraulic Company some years prior thereto, which water so owned by said St. Joseph Hydraulic Company was to be and has been used on the north side of the St. Joseph river by means of a raceway, owned by said St. Joseph Hydraulic Company on the north side of the St. Joseph river, which connects with the water of the St. Joseph river above said dam

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and extends upon the north side of said river westwardly to a point below said dam; that said St. Joseph Hydraulic Company had arranged for factory sites for the purpose of furnishing and leasing to factories and mills water power out of its said hydraulic head-race; that on said day there were standing upon the bank of said hydraulic head-race and between it and the St. Joseph river, large factory buildings, which were then empty and unoccupied, but which had theretofore been used as a paper mill; and that said company had flumes connecting with said buildings and six water wheels, all set and ready for use, and a tail-race for the purpose of carrying off the water coming from said raceway and flumes and through the water wheels in said buildings, and emptying the same into the St. Joseph river below said dam; that plaintiff was desirous of purchasing said buildings and rearranging the machinery therein for the purpose of operating a paper mill plant, and to that end plaintiff and the St. Joseph Hydraulic Company on said day entered into a parol agreement, by virtue of which the St. Joseph Hydraulic Company, for the sum of \$2,000.00 yearly rental, payable quarterly by plaintiff, agreed to furnish the Globe Tissue Paper Company 9,927 cubic feet of water per minute under a working head of ten feet and more or less proportionately as the head might vary below or above said ten feet above named from said hydraulic head-race, to be delivered to said Globe Tissue Paper Company through said flumes adjacent to said race for the term of twenty-five years. It was further agreed between said parties that said contract should be reduced to writing and be signed by each; that afterwards plaintiff caused a formal written lease, in accordance with the terms of said parol contract, to be drawn up and signed by plaintiff, which was delivered to said hydraulic company, but said

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company as yet has not executed the same; that after said agreement was entered into, and upon the faith thereof and in reliance thereon, the plaintiff purchased said factory buildings and the land upon which they stand and placed therein a large amount of costly machinery for the manufacture of paper at an expense of over \$25,000.00; that at the time said agreement was made said St. Joseph Hydraulic Company well knew the condition and location, number and height of the water wheels contained in said building, and well knew the location and condition of the tail-race connecting said mill and said wheels with the St. Joseph river; that plaintiff completed its said plant so purchased by it, and began the manufacture of paper in the same on the 1st day of October, 1891, and has been in possession and so engaged ever since, except when said mill was temporarily shut down, caused by the wrongful conduct of the defendant, hereinafter alleged, and plaintiff has, during all that time, kept and performed all its part of the agreement with said hydraulic company. It was further agreed on the part of said hydraulic company with plaintiff that the plaintiff company should have a priority of right to use said water out of said hydraulic race over all other leases of said St. Joseph Hydraulic Company; that on or about the — day of May, 1894, the St. Joseph Hydraulic Company leased to the defendant out of said head-race certain water power, which defendant took with full knowledge of and subject to plaintiff's lease aforesaid; that defendant has drawn water from said race ever since, and threatens to continue so to do, as hereinafter stated, with notice and knowledge of plaintiff's rights; that said defendant is a manufacturing corporation, and has constructed its plant 150 feet westward of plaintiff's plant; that defendant began operating its plant about the — day of

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_____, 1894, and using as part of its power, water power from said hydraulic company's head-race; that from the time said defendant began using water from said head-race until about three weeks ago said race furnished enough water so that plaintiff could run its said mill by the use of water from said raceway, but within the past three weeks, on account of the low stage of water in the St. Joseph river, there has not been enough in said head-race to furnish plaintiff 9,927 cubic feet of water per minute under a working head of ten feet, the amount of water contracted for by it; that the amount of water coming down said head-race in the last three weeks has not been more than enough to make 9,927 cubic feet of water per minute, if plaintiff had had the use of all said water that came down said race; that the water wheels of plaintiff, located as they were at the time of the purchase of said buildings by plaintiff, and as they now are, will afford a ten foot head in ordinary stages of the water in the St. Joseph river when the water in said raceway is not drawn off and lowered by the wrongful use of said water by the defendant; that notwithstanding the plaintiff's priority of right, the defendant has for the last three weeks, and now continues to, wrongfully and without right, use said water without reference to plaintiff's rights, using nearly all of the water which has for the past three weeks come down said race; that for the past three weeks the defendant has been constantly, wrongfully and without right drawing off water from said head-race, and has thereby decreased plaintiff's head to such an extent that plaintiff cannot get water enough from said race to run any of its said water wheels or machinery, nor the amount of water contracted for, and was obliged, by reason of the wrongful conduct of the defendant, to shut down

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plaintiff's said plant and stop its said mill, throwing out of employment all of plaintiff's employes, twenty-five in number; that plaintiff has a large business in exporting and selling its manufactured paper, and has many orders for paper on hand from various parties which are past due and coming due, but which plaintiff will be unable to fill and send out on account of the wrongful conduct of defendant, aforesaid; that plaintiff has no other way of running its said mill than by said water power; that defendant has, in connection with its water wheels a large boiler and two steam engines for the purpose of furnishing power for the defendant's said factory, which plaintiff is informed and believes are sufficient to run said factory without the use of said water power. The plaintiff has been damaged by defendant's said wrongs \$5,000.00; that all the plant and property of defendant is worth less than \$20,000.00; that the same is now mortgaged to Justus L. Broderick for \$20,000.00; that said defendant, as plaintiff believes, is, or soon will be insolvent.

Prayer for a temporary restraining order, restraining defendant from using any of said water power, excepting such surplus water in said head-race as may be therein contained hereafter over and above the amount of power so contracted for by plaintiff, to-wit, 9,927 cubic feet of water per minute, and on the final hearing that the injunction be made perpetual during the remainder of the time plaintiff's contract is to run. The temporary restraining order was issued in accordance with the prayer.

The objections urged against this complaint are general, and amount to a contention that it fails to show an equitable right or a clear right to the water; that the injury is not permanent but temporary; that the injury done and threatened is not irreparable, etc.

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But we think the complaint sufficient to withstand an attack on it for the first time in this court. It is true, the trial court overruled a demurrer to it, but that ruling is not assigned for error.

On appeal from an interlocutory order overruling a motion to dissolve an injunction, as here, where one of the points made for reversal was the alleged insufficiency of the complaint, this court, borrowing from an approved author, said: "It is not, however, necessary that a case should be made out which would entitle the plaintiff to relief, at all events at the hearing. It is enough if the court finds upon the pleadings and the evidence a case which makes the transaction a proper subject for investigation in a court of equity. The question for the court upon the interlocutory application is not the final merits of the case. When the case comes on to be heard, the final merits may be very different. But this consideration will not prevent the court from breaking in upon the proceedings at law, where from the merits to be gathered from the pleadings and conflicting affidavits there appears on the whole a case proper for the investigation of the court, and a fair question to be reserved till the hearing." *Kerr Inj.*, p. 14; *Spicer v. Hoop*, 51 Ind. 365, at pp. 371, 372.

The only evidence was by way of affidavits read on both sides. The affidavits in support of the application fully support the complaint and warranted a temporary injunction. In such a case we can no more determine the weight of conflicting affidavits than we can settle conflicts in the evidence on appeal from a final judgment. *Spicer v. Hoop*, *supra*; *Schnurr v. Stults*, 119 Ind. 429; *Louisville, etc., R. W. Co. v. Hendricks*, 128 Ind. 462.

The defendant's affidavits tended to prove some of the allegations in the second paragraph of its answer,

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the first paragraph being a general denial. Those allegations are that "defendant says that it is the duty of the plaintiff to lower its wheels three feet and to lower its tail-race two feet; that the plaintiff under a seven foot head wastes constantly more than fifty-six effectual horse powers because of want of repairs in their wastes; that under a greater head it wastes more water; that the defendant's wheels are set skillfully and three feet lower than the plaintiff's; that the plaintiff cannot use the water at a less head than four feet; that when the plaintiff has four feet of water the defendant has seven feet, and can use all the power it needs."

The affidavits were conflicting on all these points, but the affidavits on behalf of the plaintiff concede that the plaintiff does waste some water, but not as much as the affidavits on the other side show, and no more than is ordinary in such cases.

On this point appellant's counsel plant themselves in a vigorous contention that there being no conflict on the point that there is a needless waste of water by appellee, that there ought to be a reversal.

But it is impossible to see how it should make any difference in the legal rights of the appellant if the appellee saw fit to waste all the water it had purchased. It is not contended that it at any time took more than 9,927 cubic feet per minute. This it had purchased and paid for, and it had a right to use it or waste it just as it chose. If the appellant desired to get the use of the part thereof not needed by appellee, it ought in good conscience to get the consent of the owner, and if that consent could not be got without paying for it, that was its plain duty. What we have already said disposes of the motion to modify the temporary restraining order.

But we may suggest a serious question presented

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by the record, but not mentioned by counsel on either side, and this court does not decide the question. The complaint, answer and interlocutory order are all in a bill of exceptions, filed and set out in the transcript. These are matters that belong to the record proper without a bill of exceptions. Neither of these necessary parts of the record proper appear therein otherwise than in the bill of exceptions. The office of the bill of exceptions is to bring into the record matters which do not belong to or appear in the record proper. And when the bill of exceptions embraces matters, which in regular course ought to be in the record proper, the law does not require them to be considered on appeal, unless some statute so specially provides. *Bowen v. State*, 108 Ind. 411, and authorities there cited; *Gray v. Singer, Admr.*, 137 Ind. 257; 3 Ency. of Plead. and Prac., pp. 404-406, and authorities there cited.

Finding no available error in the record, the temporary restraining order is affirmed.

CAMPBELL v. IRWIN.

[No. 18,028. Filed February 2, 1897.]

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163	645

SLANDER.—Plea in Justification.—Requisites Of.—In a civil action for slander the plea or answer of justification must affirmatively show that the plaintiff is guilty of the offenses imputed by the words set out in the complaint, and that they were true in the sense in which they were averred to have been spoken by the defendant. A mere reiteration of the slanderous words, with an averment that they are true, is not sufficient.

From the Montgomery Circuit Court. *Reversed.*

M. E. Clodfelter, for appellant.

M. W. Bruner and Crane & Anderson, for appellee.

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JORDAN, C. J.—Appellant, an unmarried woman, sued the appellee in an action for slander, wherein she demanded damages for the alleged wrong in the sum of \$5,000.00. The complaint is in three paragraphs, each containing three sets of words upon which the alleged slander is based. By innuendoes and averments, it is charged that the defendant, on the several occasions mentioned, by speaking and publishing the words set out therein, imputed to the plaintiff the crime of fornication with one Dr. S. G. Irwin; that she so meant and intended to impute said crime to the plaintiff, and was so understood by the persons in whose presence the words were spoken. The complaint was held sufficient by the court upon demurrer, and the appellee filed her answer in two paragraphs, the first being a general denial. The second purports to be in justification, and was held to be sufficient as such on demurrer. Under the issues joined, a trial by jury resulted in a verdict for the defendant, and judgment was rendered in her favor for cost.

Among the errors assigned, the action of the court in overruling appellant's demurrer to the second paragraph of the answer is called in question. This paragraph is as follows:

"2d Par. The defendant, for further cause of defense herein, alleges that she admits the speaking of the words set out in the complaint, but she says that Dr. S. G. Irwin has been keeping and running the plaintiff for a long time; that Dr. S. G. Irwin did have plaintiff locked up in his back office for bad purposes and was criminally intimate with her, and plaintiff did have criminal intercourse with Dr. S. G. Irwin, and she is not a virtuous woman; that plaintiff did send for Dr. S. G. Irwin at Alamo, and that he did go when it was pouring down rain when he would not

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have gone across the street to see any other patient. So the words charged in the complaint are true, and defendant demands judgment for costs."

By section 286, Burns' R. S. 1894 (285, R. S. 1881), every charge of incest, fornication, adultery, or whoredom, falsely made against a female, is actionable in the same manner as are slanderous words charging a crime, etc. Fornication is made a crime by the criminal code, section 2077, Burns' R. S. 1894 (1991, R. S. 1881). The infirmity of this answer in the main is that it simply reiterates, in part, the defamatory words averred in the complaint with a conclusion that they are true, without setting out a single fact that the charge or offense of fornication attributed to the appellant, as alleged in her complaint, was true. It is well settled by our decisions that the justification of the slander must be as broad as the charge, and must apply to the very charge which the defendant attempts to justify. The plea or answer of justification is required to affirmatively show that the plaintiff is guilty of the offenses imputed by the words set out in the complaint, and that they were true in the sense in which they are averred to have been spoken by the defendant, and where it is addressed to the entire charge, it must justify every set of words alleged in the complaint. Section 376, Burns' R. S. 1894 (373, R. S. 1881), provides that the defendant may allege the truth of the matter charged as defamatory, etc. Section 350, Burns' R. S. 1894 (347, R. S. 1881), pertaining to the practice in civil actions, provides that "the answer shall contain * * * a statement of any new matter constituting a defense, etc., in plain and concise language." Neither of these provisions of the code can be said to authorize a defendant in an action for slander to justify by the mere reiteration of the slanderous words in his answer, with an averment

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that they are true, without a statement of any facts showing that the imputed charge of which plaintiff complains is true.

Under the common law rule, the defendant in his plea of justification was required to state specific facts, showing in what particular instances and the exact manner in which the plaintiff had misconducted herself. 1 Chitty on Plead., p. 522. Our code does not seem to have changed the common law rule in this respect. The decisions of this court and many other authorities sustain the requirement that to render an answer in justification in a libel or slander suit sufficient as such it must specifically allege the facts constituting the wrong charged to the plaintiff by the slanderous words, and where they attribute to him the commission of a crime, the defendant can only justify by stating in his answer the facts constituting the plaintiff guilty of the particular crime. It is not merely the words, but the charge contained therein that must be true in order to justify the defendant in speaking them. See *Mull v. McKnight*, 67 Ind. 535; *Funk v. Beverly*, 112 Ind. 190.

A distinction is made where the words impute an offense in a general way, and where they particularize the charge. Where the defamatory words as set out sufficiently describe the offense, then an admission by the defendant that he spoke the words as charged, and a general affirmation that they are true, has been held to be sufficient. The authorities go to the extent that the defendant, by his *quasi* indictment, under his answer in justification, puts the plaintiff upon trial as to the particular offense therein averred, and therefore it should be equally as direct and certain as regards the party and the offense as is required of an indictment or information in a criminal prosecution. *Mull v. McKnight*, *supra*, and authorities there cited; Townsend

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on Slander and Libel (2d ed.), sections 212, 357 and 358; *Downey v. Dillon*, 52 Ind. 442, and authorities there cited. The following additional authorities sustain the rule as to the requisites of a plea of justification. *DeArmond v. Armstrong*, 37 Ind. 35; *Sunman v. Brewin*, 52 Ind. 140; *Miller v. McDonald*, 139 Ind. 465; Bliss on Code Plead., section 161; *Wachter v. Quenzer*, 29 N. Y. 547.

Tested by the rule asserted and maintained by the decisions of this court and the other authorities, the second paragraph of the answer cannot be held sufficient as a plea of justification, and for the error in overruling the demurrer thereto the judgment must be reversed.

Some other questions are discussed by counsel for appellant, but as these may not arise again upon another trial, we pass them without consideration.

The judgment is reversed and cause remanded to the lower court, with instructions to grant appellant a new trial and sustain her demurrer to the second paragraph of appellee's answer, with leave to amend.

O'TOOLE ET AL. v. HOWERY.

[No. 17,794. Filed February 8, 1897.]

PARTNERSHIP.—*Insolvency.*—*Sale of Property by Partner.*—In the absence of fraud or a showing that injury would result to the partnership, an insolvent partner of an insolvent partnership may sell personal property belonging to such partnership to a person who is known to be insolvent.

From the Shelby Circuit Court. *Reversed.*

Adams & Carter, for appellants.

Hord & Adams, for appellee.

O'Toole et al. v. Howery.

HOWARD, J.—The appellee, George W. Howery, and the appellant, Stephen Crawley, were partners in the saw mill business, having for that purpose leased a “mill and some lands adjoining thereto.” This action was brought by the appellee to enjoin the appellant, John O'Toole, from removing from said land certain growing corn, sold to O'Toole by Crawley. Crawley was made a party to answer as to his interest in the controversy.

A temporary restraining order was issued as prayed for, and, on final hearing, O'Toole was perpetually enjoined from gathering or removing any of said corn.

It is contended that the court erred in overruling demurrers to the complaint and in overruling the motion for a new trial.

The complaint, after stating the formation of the partnership of Howery and Crawley and the leasing by them of the saw mill and adjoining lands, alleges that the firm “has contracted indebtedness to an amount of over \$400.00, and the said Crawley is indebted to the said firm in the sum of \$141.00; and that the said partnership is insolvent, and all the property of said firm was destroyed by fire, except some lumber of the value of \$100.00 and the one-half of thirty acres of growing corn of the value of \$300.00; that the said Crawley and the said O'Toole are insolvent, and the said Crawley has pretended to sell to the said O'Toole one-fourth interest of said firm in said growing corn; and he is now engaged in gathering and carrying off said corn, and will continue to do so until he has taken all of the full one-fourth thereof; that said O'Toole has already carried off about \$50.00 worth of said corn and appropriated the same to his own use, and is threatening to carry off the residue thereof; that this plaintiff is solvent and liable for said indebtedness, and will, if said property is taken away and lost, be

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required to pay the debts of said firm out of his own property."

We do not think the allegations of the complaint sufficient to authorize the injunction against O'Toole. There is nothing to show why Crawley, as one of the partners, might not sell the partnership property in question. If the property was of a kind which, for any reason, should not be sold; if it was sold for less than its value; or if, in any way, the sale was made to the injury of the partnership, the fact should be made to appear by proper allegation. From the circumstance that Crawley was insolvent and was indebted to the firm, it does not follow that the transaction was dishonest; if the money received by Crawley for the corn were the full value of the property sold, and were used by him in part payment of the firm's indebtedness, we cannot see that any wrong was done by him in selling the corn. As a partner, unless the contrary were shown, he had the same right as Howery to dispose of the firm property. Nor is it clear why the corn should not be sold, as well as the lumber that was left. The mill was destroyed, the firm insolvent, the business ended, and all the property left was insufficient to pay the debts. That, under these circumstances, one of the partners should have made sale of "one-fourth interest of said firm in said growing corn" does not show any wrong on his part. If, instead of one-fourth, he had sold all the firm's corn for its full value, and made proper application of the proceeds, such sale would not have shown any wrongdoing on his part. Fraud cannot be presumed, but must be alleged and proved.

But so far as O'Toole is concerned, against whom the injunction is directed, there seems even less reason why the decree should have been entered. The sole allegation against him, if such it can be called, is

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that he is insolvent. But an insolvent man may purchase property without being thereby held to be guilty of wrongdoing. It is not said that O'Toole conspired with Crawley to engage in any fraud upon the firm or upon Howery. It is not even shown that O'Toole had any knowledge of the insolvency of the firm, or that he knew of any reason why one of its partners might not honestly sell him a part of the firm property. Even if Crawley had been engaged in any underhand proceeding, which is not alleged, still O'Toole should not for that be held chargeable with guilty knowledge of Crawley's wrongdoing. If the purchase was a fair, open transaction on O'Toole's part, certainly he should not be enjoined from gathering and carrying off the corn which he had so purchased. The allegations of the complaint fail to show any sufficient reason for the injunction.

The judgment is reversed, with instructions to sustain the demurrers to the complaint and with leave to amend.

HACKNEY, J., took no part in the decision of this case.

COMBS v. THE UNION TRUST COMPANY, TRUSTEE OF
THE NEW ALBANY RAIL MILL COMPANY.

[No. 18,029. Filed February 8, 1897.]

PLEADING.—*Plea in Abatement.*—*Sufficiency Of.*—An answer in abatement is not required to state facts sufficient to constitute a defense to an action, it is sufficient if it states facts sufficient to abate the action.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Attachment by Foreign Creditor.*—A foreign creditor cannot by attachment proceedings sequester the property in another state which has been voluntarily assigned by a debtor in this State for the benefit of all his creditors, and at the same time prosecute his claim against the assignee in this State, and have the claim allowed, and share in the funds which the assignee has in his hands for the payment of debts.

146	688
149	390
151	27
146	688
166	588

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EVIDENCE.—*Examination of Party.—Admission in Evidence of Answers to Interrogatories.*—The defendant having the right to introduce in evidence the answers to interrogatories propounded to the plaintiff in accordance with section 862, Burns' R. S. 1894 (359 R. S. 1881), the plaintiff cannot complain of their introduction on the ground that they were not the best evidence. If the interrogatories were improper the question should have been raised by a motion to reject.

SAME.—*Examination of Party.—Answers to Interrogatories are Admissions.*—Answers to interrogatories propounded to a party in accordance with section 862, Burns' R. S. 1894 (359 R. S. 1881), are admissions of the party under oath, and the rule that parol evidence is not admissible to prove the contents of documents and other writings or other facts shown by the decree of a court or other public record, does not apply in all its strictness. Such admissions are received as primary evidence.

From the Floyd Circuit Court. *Affirmed.*

G. B. Cardwill and *E. G. Henry*, for appellant.

C. L. Jewett and *H. E. Jewett*, for appellee.

MONKS, J.—On July 21, 1893, the New Albany Rail Mill Company made an assignment to appellee for the benefit of all its creditors. Appellant, a resident of the state of Illinois, claimed that said New Albany Rail Mill Company was indebted to him in the sum of \$5,000.00, and filed the claim therefor with appellee for allowance. This claim was disallowed by appellee and, as required by law, the same was placed upon the docket of the court below for trial.

Appellee filed answer in abatement, to which appellant filed a demurrer, which was overruled, and a reply was filed by appellant to said answer. Upon the issues so joined the court tried said claim, and at request of appellant made a special finding of the facts and stated its conclusions of law thereon, and over a motion for a new trial rendered judgment in favor of appellee that said action abate.

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The errors assigned call in question each conclusion of law, the action of the court in overruling the demurrer to the answer in abatement, and in overruling the motion for a new trial. The ground of objection to the answer in abatement, stated in the demurrer, was that it did not state facts sufficient to constitute a defense. An answer in abatement is not required to state facts sufficient to constitute a defense to the action, it is sufficient if it states facts sufficient to abate the action. The demurrer did not present this question, and was therefore properly overruled.

It appears from the special finding that appellant, after the assignment to appellee and before he filed his claim with appellee, to-wit, on August 11, 1893, brought an action thereon in the circuit court of Cook county, Illinois, and in said action a writ of attachment was issued and levied upon about thirty tons of sheet iron, property which was covered by said assignment, and which was afterwards sold by the sheriff of said county in an attachment proceeding of other creditors of said New Albany Rail Mill Company, and the net proceeds of said sale, about \$800.00, were paid into said circuit court, where the same are awaiting the decision of the court whether the same should be paid to appellant or to the other claimant.

The court stated, as a conclusion of law, that appellant had no right to prosecute this case until the proceeding in Illinois was disposed of.

The question presented by the exceptions to the conclusions of law is, whether a foreign creditor can by attachment proceedings sequester the property in another state which has been voluntarily assigned by a debtor in this State for the benefit of all his creditors and at the same time prosecute his claim against the trustee in this State and have the claim allowed and share in the funds which the assignee has in his hands

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for the payment of debts. If he cannot, the court did not err in its conclusions of law.

It is the law in this State concerning voluntary assignments that the claims of the creditors, foreign and domestic, shall be allowed and paid *pro rata*, and that the holder of any lien or incumbrance on any of the property assigned shall only share *pro rata* with the other creditors in the residue of his claim after the application of the proceeds of the property upon which the lien or incumbrance is held. Section 2911, Burns' R. S. 1894 (2674, R. S. 1881.) If a resident of this State should go into another state where there is property covered by the assignment and seek by legal proceedings to have the same applied to the payment of his claim, and thus secure more than his *pro rata* share with other creditors, he may in such case be enjoined in the courts of his domicile from prosecuting his suit in the courts of such foreign jurisdiction. *Wilson v. Joseph*, 107 Ind. 490, and cases cited; *Sandage v. Studebaker, etc., Co.*, 142 Ind. 148, 157; *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. 232 and note, 12 South. 633; *Vermont & C. R. R. Co. v. Vermont Cent. R. R. Co.*, 46 Vt. 792; *Cole v. Cunningham*, 133 U. S. 107.

And if such domestic creditor is not enjoined and files his claim with the trustee, he will be charged with the amount collected upon his claim out of the property in the foreign jurisdiction and required to account for the same in the distribution among the creditors so that he shall only share *pro rata* with the other creditors. *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep., note p. 137, 4 Atl. 250; Dicey on Conflict of Laws (Am. ed.), 337.

This rule also applies to foreign creditors, and if they have collected any part of their claim by legal proceedings after the assignment, they must account

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for the same in like manner as a domestic creditor before their claim will be allowed. And so long as such proceeding is pending and undisposed of, his claim, if filed with the trustee in the domicile of the debtor, may be stayed or proceedings thereon abated. These rules are the necessary result of the policy of our law that all unsecured creditors are to be paid *pro rata*.

If it were conceded that appellant had a lien on said sheet iron by virtue of his attachment proceeding in Illinois, and that said lien was superior to appellee's title thereto, appellant would not be entitled to receive any portion of his claim out of the general fund in the hands of appellee until he proceeded to enforce payment of his debt by sale or otherwise of said sheet iron. Section 2911 (2674), *supra*. The special finding shows that the legal proceedings instituted by appellant in the state of Illinois are still pending, and it is clear that he is not entitled to receive anything from appellee until it is known what amount he has collected by that proceeding.

It follows that the court did not err in its conclusions of law.

It is next urged that the court erred in overruling the motion for a new trial.

Interrogatories were propounded to appellant before the trial, under section 362, Burns' R. S. 1894 (359, R. S. 1881), which were answered by him under oath, and the same were read in evidence at the trial, over the objection of appellant, "that the said answers were concerning the attachment proceedings commenced by him in the state of Illinois, which could only be proven by an authenticated copy of the record." This is also specified as a cause for a new trial.

It is clear, however, that the court did not err in

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permitting the answers to interrogatories to be read in evidence. It is expressly provided by section 362 (359), *supra*, that after the interrogatories have been answered that the party requiring them has the right to read them in evidence. If the interrogatories were not relevant, or it was not proper to answer them for any reason, appellant should have moved the court to reject them. Having failed to present the question at the proper time, and having answered the interrogatories, he cannot afterwards complain that they were introduced in evidence. *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280.

Besides, answers to interrogatories are admissions of the party under oath, and the rule that parol evidence is not admissible to prove the contents of documents and other writings or other facts shown by the decree of a court or other public record, does not apply in all its strictness to the admissions of a party. Such admissions are received as primary evidence. 2 Works Prac., section 1233; *Loomis v. Wadhams*, 8 Gray, 557; *Smith v. Palmer*, 6 Cush. 513; *Edgar v. Richardson*, 33 Ohio St. 581, 31 Am. Rep. 571; *Taylor v. Peck*, 21 Grat. 11; *Edwards v. Tracy*, 62 Pa. St. 374; *Blackington v. City of Rockland*, 66 Me. 332; *Morrill v. Robinson*, 71 Me. 24; *Slatterie v. Pooley*, 6 Mees. & W. 663; *Earle v. Picken*, 5 Car. & P. 542; 2 Wharton on Evidence, section 1081; Stephen's Digest of Evidence (Chase's ed.), p. 127.

It is also specified as a cause for a new trial that the court erred in requiring appellant, who testified at the trial as a witness for appellee, to answer certain questions in regard to the attachment proceedings commenced by him in Illinois. The error, if any was committed, was harmless, for the reason that the answers to the interrogatories and the other competent evi-

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dence was amply sufficient to sustain the finding of the court.

There is no available error in the record.
Judgment affirmed.

BREEDLOVE ET AL. v. AUSTIN.

[No. 17,895. Filed February 4, 1897.]

MORTGAGES.—Redemption.—Merger.—Inchoate Interest of Wife.—

Where a mortgagee obtains title to real estate through foreclosure of a mortgage executed by the husband, the wife not joining therein, and afterward under Acts of 1861 (Acts 1861, p. 79, 2 Davis R. S. 220, 2 G. and H. 251), redeems from a sheriff's sale under foreclosure of a senior mortgage on same real estate, in which such wife did join, by paying to the clerk of the court the full amount for that purpose, the prior mortgagee accepting the money in satisfaction thereof, the lien of the mortgage did not merge as to the inchoate dower interest of the wife, but the redemptioner thereby obtained a lien on the wife's interest in said real estate, which could be divested only by redemption on the part of the owners or their privies against whom the judgment had been rendered, and upon the failure of such wife to redeem within the year of redemption, all interest in such real estate was lost to her forever.

From the Harrison Circuit Court. *Reversed.*

Cook & Ridley, for appellants.

W. N. & R. J. Tracewell, for appellee.

HOWARD, J.—This was an action for the partition of real estate, brought by the appellee, as widow of John D. Austin, deceased. In her petition, under provisions of section 2652, Burns' R. S. 1894 (2491, R. S. 1881), she claimed to be the owner in fee-simple of one-third of the lands described, of which her husband had been the owner during their marriage, and in the conveyance of which she had never joined.

From the averments of appellants' answer it ap-

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pears: That, on March 17, 1870, the said John D. Austin, his wife, the appellee, not joining, executed his mortgage upon the land in question to secure a note, given by him, for \$635.00; that on December 27, 1872, a decree of foreclosure for \$812.26, the amount due upon said debt, was rendered in favor of the holder of the mortgage, one Henry Long, who, on February 8, 1873, at sheriff's sale under said decree, purchased the land for \$20.00, that being the highest and best bid therefor; and that, on April 1, 1874, there having been no redemption, the said Long took out a sheriff's deed for the land, and on July 25, 1874, conveyed the same to one John S. Routh. It is further made to appear from the answer, that, on March 14, 1868, the said John D. Austin and his wife, the appellee, executed a deed for said land to one Margaret C. Powers, which deed was treated by the parties thereto as a mortgage, and on which, at the suit of the said Margaret C. Powers, on June 6, 1873, judgment of foreclosure was rendered; that on July 26, 1873, at sheriff's sale, under said decree, the land was sold to the said Margaret C. Powers for \$380.00, and a sheriff's certificate given to her therefor; that neither John D. Austin nor his wife, the appellee, redeemed from said sale; that, within the year allowed for redemption, the said John S. Routh, holder of the sheriff's deed under the former sale, redeemed said real estate from said sale to Margaret C. Powers, by paying to the clerk of the court the full amount required by law for that purpose, and the same was accepted by the said Margaret C. Powers as in satisfaction of her debt; that afterwards, by mesne conveyances from John S. Routh, the appellants acquired their title to said land and are now in possession of the same.

Other pleadings stated the facts substantially as

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set out in the answer. The court held the facts insufficient to show that the title of the appellee to her one-third interest in the land of her husband had been divested, and decreed partition in her favor.

John D. Austin died in 1892, at which time his widow's interest in his lands, if any she had, first accrued. During marriage any right which she might have, remained inchoate, and had she died before her husband there is no doubt that, under the foreclosure and redemption proceedings, the title under which appellants claim would have become absolute to all the land. It is also clear that had John S. Routh, appellant's remote grantor, taken an assignment of the sheriff's certificate, held by Margaret C. Powers, instead of redeeming from the sale to her, the lien and right to redeem held by her would have gone to him, and his title to all the land, even without an additional sheriff's deed, could not have been questioned by any one; all possible liens and titles would have centered in him, and the liens would thus have merged in the title. On the other hand, had Routh not redeemed from the Powers sale, but relied entirely upon the sheriff's deed, taken out on the Long foreclosure, it is equally certain that, according to the statutes then in force, the title to the one-third of the land, must remain uncertain during the marriage of Elizabeth and John D. Austin. Her inchoate right came to her through her husband, to die with her if she died before him, and to ripen into ownership if she survived him.

Appellee was not bound by the Long mortgage, as she had not joined in it; but she was bound by the Powers mortgage, in which she had united with her husband. This mortgage, moreover, was foreclosed and the mortgaged land sold under the decree. All, therefore, of appellee's right, title and interest in the

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land, together with any that her husband might have under that mortgage, passed by the sale to Margaret C. Powers. The only question, consequently, is as to what was the effect of the redemption from the Powers sale by John S. Routh.

The statute in force at the time, providing for the redemption of real property, or any interest therein, sold on execution or order of sale, was the act of June 4, 1861. Acts of 1861, p. 79, 2 Davis R. S., p. 220, 2 G. & H. p. 251. By the first section of that act it was provided that in case of such judicial sale of real estate "the owner thereof, his heirs, executors, administrators, or any mortgagee or judgment creditor having a lien upon the same may redeem such real property or interest therein, at any time within one year from the date of such sale," etc. And, by section third, it was provided that "when any mortgagee or judgment creditor shall redeem any real property or interest therein under the provisions of this act, such mortgagee or judgment creditor shall retain a lien on the premises for the amount of the money so paid for redemption against the owner and any junior incumbrancer."

Two classes of redemptioners were thus provided for: (1) owners of the land or any interest therein, and (2) mortgagees or judgment creditors having a lien upon such land or interest therein. It was plainly intended by the statute that, in case of redemption by the owner, his heir or representative, not only should the sale be vacated, but the lien, unless, possibly, it ought to be kept alive for equitable reasons, should be merged in the owner's title; while in case of redemption by the mortgagee or judgment creditor, the sale alone should be vacated, and the lien upon which the sale was made, should be transferred to the redemptioner to be held by him against the owner, and

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also against other incumbrancers, junior to the owner. *McClain v. Sullivan*, 85 Ind. 174.

Appellee contends that in the case at bar, redemption from the Powers sale was made by Routh as owner, since at the time he held the sheriff's deed, taken out on the Long foreclosure sale; and, consequently, that the lien of the Powers mortgage was merged in the title received through the sale under the Long mortgage. Appellants, on the other hand, contend that the redemption was by Routh as mortgagee or judgment creditor; he being subjected to the rights of Long under the first mortgage and judgment and, hence, that there was no merger.

It may be admitted that, by the redemption, the lien of the Powers mortgage, in so far as it covered the interest of John D. Austin in the land sold, was merged in the title of the redemptioner. As to that interest, he was already the owner under his sheriff's deed; and no equity is shown which should prevent the merger. But in so far as concerns appellee's inchoate interest, Routh was not the owner. He did not take the husband's place when he acquired the husband's interest. The wife's interest, though inchoate, and its accrual dependent upon her survival of her husband, was yet independent of the holder of the husband's interest. After the mortgage sale, however, there was no equity in her favor, save only her right to redeem. She had mortgaged her interest, and that mortgage had been foreclosed and her interest sold.

On the foreclosure and sale the lien created by that mortgage, and which covered appellee's interest, as well as that of her husband, awaited only the sheriff's deed to ripen into full title. That lien could be divested only by redemption on the part of the owners, or their privies, against whom the judgment had been taken; that is, John D. Austin and his wife. Neither

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of these redeemed, and it would seem that any right which either of them had was thus lost to them forever. That would of course be true if a sheriff's deed had issued. As such deed never issued, it remains to inquire what became of the lien. The lien did not remain in Mrs. Powers, for she accepted her redemption money from Routh, in full satisfaction. *Hervey v. Krost*, 116 Ind. 268. If Routh had been the full owner, the lien would have passed to him and merged in his title, unless prevented by some equity. *Swatts v. Bowen*, 141 Ind. 322. He was the owner of John D. Austin's interest, and as no equity appears which might have prevented it, the lien, as we have seen, so far as the husband's interest is concerned, was merged. But Routh was not the owner of the wife's inchoate interest, and the lien, so far as concerns that interest, could not merge, but remained in Routh, and his assignees, provided only he had a right to redeem as to such interest.

Had Routh a right to redeem as to appellee's inchoate interest? If he were the holder of the Long judgment lien, instead of the deed received thereunder, he certainly would have a right, under the statute, to redeem as such judgment creditor. Were his rights less by reason of his deed?

In *Patterson v. Rosenthal*, 117 Ind. 83, there was a foreclosure and sale of real estate under a mortgage in which a wife had joined. Judgment creditors of the husband redeemed from the mortgage sale, and then proceeded to sell the land under their judgment, the purchaser, in due course, receiving a sheriff's deed therefor. Afterwards, as in this case, the wife brought an action in partition against the holder of the sheriff's deed, claiming that the redemption by the judgment creditors had satisfied the decree in foreclosure and thus released her inchoate interest from

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the lien, and that she was therefore the owner of one-third of the land. The court, however, held that by their redemption the judgment creditors had succeeded to the rights acquired under the mortgage foreclosure sale, and that by the subsequent sale and deed under the judgment the wife's interest was wholly divested.

That case differs from this in the method pursued, rather than in the result reached. In both cases, the deed was received in pursuance of the sale under the judgment taken against the husband alone. In both there was a redemption from the sale under the mortgage in which the wife had joined; the redemption in each case also being by the party claiming under the judgment against the husband alone. The cases differ only in the circumstance that in the former the redemption took place before, and in the latter after receiving the deed.

At most it could be contended that in this case, no sale having followed the redemption, the lien on appellee's interest, and not the interest itself, passed to the appellants; and, hence, that appellee, as owner of such interest, might recover the same by paying to the appellants the amount paid by their remote grantor, Routh, in redeeming from the Powers sale. This last is the theory maintained in the cross-complaint, and, in the absence of the joint answer the contention might perhaps be good, although it is doubtful whether any right of redemption could remain to the wife any more than to the husband after the expiration of the year allowed by the statute for that purpose. We think, however, that the answer was good. The right of a married woman to protect her inchoate interest in the land by redeeming from a foreclosure sale has been fully recognized under our decisions. *Baker v. McCune*, 82 Ind. 339; *Butler v. Thornburg*, 141

Sutherland *et al.* v O'Donnell.

Ind. 152. But this right she failed to avail herself of. Neither appellee nor her husband redeemed from the sale under their mortgage, and we can see no reason why the title of each was not as absolutely divested as it would have been by their deed. *Watson v. Clendenin*, 6 Blackf. 477. Appellants' remote grantor, however, having a right to redeem from that sale did so, and thus succeeded to the Powers lien; and if he and his successive grantees have chosen to retain their lien instead of foreclosing it, that is not a matter that can concern appellee.

We conclude, therefore, that the lien created by the Powers mortgage on appellee's inchoate interest, having passed from Mrs. Powers on receipt of her redemption money, and not having been protected by appellee as owner, remained with the redemptioner, Routh, and is now in appellants, his remote grantees, and that appellee has therefore no interest whatever in the land in controversy.

The judgment is reversed, with instructions to overrule the demurrer to the joint answer, and for further proceedings not inconsistent with this opinion.

SUTHERLAND ET AL v. O'DONNELL.

[No. 17,997. Filed January 27, 1897.]

From the Washington Circuit Court. *Reversed.*

Harvey Morris, for appellants.

Zaring & Hottel and *Mitchell & Mitchell*, for appellee.

MONKS, J.—The questions presented in this case are the same as those in *Sutherland v. McKinney*, *ante*, 611.

Upon the authority of that case, this case is reversed with instructions to overrule the motion to dismiss the remonstrance as to the fifty-two persons named, and for further proceedings.

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ABATEMENT OF ACTION—An answer in abatement is not required to state facts sufficient to constitute a defense to an action, but is sufficient if it states facts sufficient to abate the action, see PLEADING, 17; *Combs v. Union Trust Co., Trustee*, 688.

ACCEPTANCE—Of lands dedicated to the public, see DEDICATION, 1, 3; *Steinauer v. City of Tell City et al.*, 490.

ACCIDENT—Use of the word “accident” in an instruction to the jury in an action for negligence, see INSTRUCTIONS, 2; *Conner v. Citizens’ Street R. R. Co.*, 430.

ACTION—A plaintiff who sues several persons as joint trespassers has no right to any other than a joint recovery where the form of the issue is not modified by a severance of the answers, see TRESPASS, 1; *Ashcraft et al. v. Knoblock*, 169.

1. *Joinder of Causes.—Right to Jury Trial.—Statute Construed.*—Under section 409, R. S. 1881 (412 Burns’ R. S. 1894), which provides that “in case of the joinder of causes of action or defenses, which prior to 1852 were of exclusive equitable jurisdiction, with causes of action or defenses which prior to said date were designated as actions at law and that the former shall be triable by the court, and the latter by a jury, unless waived,” etc., there may properly be joined causes or defenses, one of which is triable by the court and the other by a jury. *Field v. Brown et al.*, 293.

2. *Practice.—Equitable Jurisdiction.*—Where equity takes jurisdiction of the essential features of a cause it will determine the whole controversy although there may be incidental questions of a legal nature. *Ib.*

3. *Equitable Defense.*—Answers showing that all of the defendants except one were bankers and that between February, 1887, and January, 1891, they received from plaintiff and his agents, by way of deposits, large sums of money aggregating more than \$300,000.00, all of which they had paid out upon appellant’s checks and that the deposits consisted of 600 items and the payments upon checks consisted of 800 items, do not present an equitable defense to an action for money had and received on the ground that the transaction was complex and multifarious in character. *Ib.*

ADMISSIONS—Answers to interrogatories propounded to a party are treated as admissions and are received as primary evidence, see EVIDENCE, 9; *Combs v. Union Trust Co., Tr.*, 688.

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ADVERSE POSSESSION—

1. *Essential Elements Of*.—Ordinarily there are five indispensable elements in adverse possession: 1. It must be hostile and under a claim of right. 2. It must be actual. 3. It must be open and notorious. 4. It must be exclusive. 5. It must be continuous.
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2. *Possession of Part of Tract, Constructive Possession of Entire Tract*.—Possession under color of title of any part of a tract of land is held constructively to include the whole of such lands. *Ib.*
3. *Exercise of Exclusive Dominion*.—Possession under color of title cannot be more than the exercise of exclusive dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it. *Ib.*
4. *Unproductive Lands.—Actual Occupancy Not Necessary*.—Adverse possession of unproductive lands is shown by the recording of deed under which the occupant claims; payment of taxes; cutting of all the valuable timber; going upon the land at intervals, claiming absolute ownership; the employment of agents in the neighborhood to look after it, and the building of a brush fence around a portion cleared, without proof of actual occupancy. *Ib.*

AFFIDAVIT—

Conflicting Affidavits Read in Evidence.—This court on appeal from an interlocutory order overruling a motion to dissolve an injunction will not determine the weight of conflicting affidavits given in evidence in the court below at the hearing thereof.

Home Electric Light, etc., Co. v. Globe Tissue Paper Co., 673.

AFFIDAVIT AND INFORMATION—As to sufficiency of in a prosecution for rape, see CRIMINAL LAW, 5; *State v. Duggins*, 427. Not necessary that it be filed in open court, see CRIMINAL LAW, 2; *Ib.*

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First National Bank v. New, 411.

ALIMONY—An attachment for contempt may be issued against a person failing to comply with an order of Court for the payment of alimony, see DIVORCE; *Stonehill v. Stonehill*, 445.

APPEAL AND ERROR—When in a criminal case the Supreme Court will disregard errors which have not prejudiced the substantial rights of defendant, see CRIMINAL LAW, 1; *Stalcup v. State*, 270.

1. *Assignment of Error*.—Where the court's conclusions of law relate to separate demands and liens against different persons and interests, and are in form but one conclusion, an assignment of

- error joined in by all the appellants, questions the correctness of the conclusions severally. *Green et al. v. Brown, Admr., 1.*
2. *Assignment of Error.*—A joint assignment of error based upon the action of the court in overruling a demurrer to two paragraphs of answer, is not available if either of the paragraphs of answer is good. *Boots v. Ristine, 75.*
 3. *Joint Assignment of Errors.*—An assignment of errors as follows: "The appellants severally aver that there is error," etc., setting out three alleged errors, is a joint assignment, the word "severally" applying to the specifications of error and not to the appellants. *Sibert et al. v. Copeland et al., 387.*
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 6. *Assignment of Errors.—Parties.*—The assignment of errors is appellant's complaint in the Supreme Court, and the only parties over whom it acquires jurisdiction are those named therein. *Big Four Building and Loan Association v. Olcott et al., 176.*
 7. *Bill of Exceptions.—Documentary Evidence.*—When it is attempted to incorporate a paper or document into a bill of exceptions by means of the words "here insert," the instrument must be so clearly identified that nothing remains for the clerk to do but to copy it in the bill at the place indicated. *Boos v. Morgan et al., 111.*
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 10. *Bill of Exceptions.—Entry.*—Where the court entry showing the filing of the bill of exceptions erroneously refers to the bill as appellant's "longhand transcript of the evidence," such unnecessary words may be rejected as surplusage. *Wabash Paper Co. v. Webb, 303.*
 11. *Longhand Manuscript.—How Incorporated in Bill of Exceptions.*—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the office of the clerk before it was incorporated in the bill of exceptions. *Rogers et al. v. Eich, 235; Beatty v. Miller, 231; Makepeace v. Bronnenberg et al., 243; Miller et al. v. Burks et al., 219; Manley v. Felty, 194; Joseph et al. v. Wild, 249; City of Decatur v. Grand Rapids, etc., R. R. Co. et al., 577.*
 12. *When Dismissed.*—An appeal will be dismissed if the assignment of errors does not contain the full names of all the parties. *Big Four Building and Loan Assn. v. Olcott et al., 176.*
 13. *Motion to Dismiss.*—The ruling on a motion to dismiss, to be available on appeal, must be made part of the record by bill of exceptions or order of court. *Smith et al. v. Reister, 527.*

14. *Evidence*.—Objections to the admission of evidence not stated at the time it is objected to cannot be urged on appeal.
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15. *Practice*.—*Action to Set Aside a Judgment on the Ground of Unsoundness of Mind of Defendant*.—In an action to set aside a judgment on the ground that defendant was of unsound mind at the time of the rendition thereof, it is necessary to show by a preponderance of the evidence that the judgment defendant was of unsound mind, as alleged; and where the evidence upon such question was conflicting in the trial court, under the well settled rule, this court will not weigh the evidence. *Smith v. McClure*, 123.
16. *Waiver of Error*.—*Failure to Discuss Errors in Brief*.—Where a demurrer is sustained to a complaint for the reason that the action is barred by the statute of limitations and such ruling is assigned as error on the ground that the complaint shows that the action is excepted from the operation of the statute, the question thus raised goes to the sufficiency of the facts averred in the complaint and the failure to discuss the question of the sufficiency of the complaint will be considered a waiver of the error.
Guy et al. v. Blue et al., 629.
17. *Erroneous Instruction*.—*When Not Available Error*.—An erroneous instruction is not available error when it is such an instruction as cannot be applied by the jury. *Board, etc., v. Bonebrake*, 311.
18. *Special Finding*.—When the special verdict of the jury or special finding of the court omits to find any fact essential to support the judgment below, the judgment cannot be sustained.
Cleveland, etc., R. W. Co. v. Moneyhun, Gdn., 147.
19. *General Verdict*.—*Presumptions*.—All reasonable presumptions and intendments must be made to sustain a general verdict.
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20. *Where Judgment is in Excess of Demand*.—*Presumption on Appeal*.—Where the amount of the judgment rendered is in excess of the demand in the pleadings, the question will be treated on appeal as if the pleading had been amended to conform to the proof.
City of Decatur v. Grand Rapids, etc., R. R. Co., 577.
21. *Objections not Raised Below*.—The objection that an occupying claimant exercised his right to recover, for improvements, under a cross-complaint in the main action can not be first made on appeal.
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Manley v. Felty, 194.
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Stults, Admr., et al. v. Gibling et al., 501.

APPEARANCE—See SPECIAL APPEARANCE.

ASSIGNMENT OF ERROR—Is appellant's complaint in Supreme Court, see APPEAL AND ERROR, 6; *Big Four Building & Loan Assn. v. Olcott et al.*, 176.

As to joint assignment of error, see APPEAL AND ERROR, 1, 2 and 3; *Green et al., v. Brown, Admr.*, 1; *Boots v. Ristine*, 75; *Sibert et al., v. Copeland, et al.*, 387.

ASSIGNMENT FOR BENEFIT OF CREDITORS—

Attachment by Foreign Creditor.—A foreign creditor cannot by attachment proceedings sequester the property in another state which has been voluntarily assigned by a debtor in this State for the benefit of all his creditors, and at the same time prosecute his claim against the assignee in this State, and have the claim allowed, and share in the funds which the assignee has in his hands for the payment of debts. *Combs v. Union Trust Co., Tr.*, 688.

ASSUMPSIT—

Sufficiency of Complaint.—Demand.—In assumpsit for money had and received, where the complaint alleges the receipt of money by defendant for the use and benefit of plaintiff, it need not allege a demand. *Field v. Brown et al.*, 293.

ATTACHMENT.—May be issued for contempt of court for failure to pay alimony, see **DIVORCE**; *Stonehill v. Stonehill*, 445.

In another state, of goods assigned for the benefit of creditors, see **ASSIGNMENT FOR BENEFIT OF CREDITORS**; *Combs v. Union Trust Co., Tr.*, 688.

ATTORNEY AND CLIENT—False statements made by an attorney to his client may amount to such fraud as to avoid a note executed in payment of fees, see **FRAUD**; *Manley v. Felty*, 194.

Negligence of Attorney.—No mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground of relief unless it would have been excusable if attributable to the client. *Moore v. Horner*, 287.

BANKS AND BANKING—President of bank as agent, see **AGENCY**; *First National Bank v. New*, 411.

A check may be given and received by agreement of the parties as payment of a debt, and the debt for which it is given is thereby extinguished, and if the check is not paid, the right of action is on the check, see **PAYMENT**; *Sutton v. Baldwin*, 361.

BASTARDY—Violation of a bond given by defendant to plaintiff in settlement of a bastardy proceeding, see **BOND**; *Porter, Tr., et al. v. Caylor et al.*, 448.

BENEFICIAL ASSOCIATIONS—

1. *Surrender of Charter by Subordinate Lodge.—Evidence.*—Where on the trial of a cause brought by a beneficial association or order against a subordinate lodge to recover possession of certain money and property on the ground that defendant lodge had voluntarily surrendered its charter, it having been shown that at a regular meeting of defendant lodge a resolution had been adopted withdrawing from the order, and it having been further shown that under the constitution and laws of the order no subordinate lodge could withdraw from the order, except by special permission, so long as nine members remained who were willing to continue, it is error to exclude evidence to show that eleven members of the subordinate lodge, not present at the time the withdrawal resolutions were adopted, formally protested against such action, at the subsequent meeting of the lodge when the minutes, including the withdrawal resolutions, were adopted. *Koerner Lodge, No. 6. K. of P., et al., v. Grand Lodge, K. of P.*, 639.

2. *Voluntary Dissolution*.—A beneficial association may be dissolved in the manner provided in its charter or constitution, and in the absence of any provision on the subject it can voluntarily be dissolved by the unanimous vote of its members. *Ib.*

3. *Diverting Funds.—Ultra Vires*.—The members of a beneficial association have no power to divert the funds and property of their lodge from the specified purposes to which, under the laws of the order, the same had been dedicated, and a resolution seeking to so divert such funds and property is *ultra vires*. *Ib.*

BILL OF EXCEPTIONS—As to the incorporation of documentary evidence in, see **APPEAL AND ERROR**, 7; *Boos v. Morgan et al.*, 111.

When it shows evidence not all in record, see **APPEAL AND ERROR**, 8; *Ib.*

Where the court entry showing the filing of, erroneously refers to same as "appellant's longhand transcript of the evidence," see **APPEAL AND ERROR**, 10; *Wabash Paper Co. v. Webb*, 303.

Longhand manuscript of evidence must be filed in the Clerk's office before it is incorporated in, See **APPEAL AND ERROR**, 11; *Rogers et al., v. Eich*, 235; *Beatty v. Miller*, 231; *Makepeace v. Bronnenberg et al.*, 243; *Miller et al., v. Burks et al.*, 219; *Manley v. Felty*, 194.

1. *Filed in Open Court*.—The filing of a bill of exceptions with the clerk in open court is equivalent to a filing in the clerk's office. *Wabash Paper Co. v. Webb*, 303.

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Home Electric Light, Etc., Co. v. Globe Tissue Paper Co., 673.

BOND—A suit upon the contractor's bond is the proper remedy when a free gravel road is not constructed in compliance with the contract, see **FREE GRAVEL ROADS**, 4; *Goodwin et al. v. Board, etc.*, 164.

Bastardy.—A bond given by defendant to plaintiff in settlement of a bastardy proceeding, conditioned that the defendant would marry, live with, support and kindly treat the plaintiff as his lawful and wedded wife, is violated by the communication to the plaintiff, shortly after such marriage, of a loathsome disease, causing her much pain, and causing the premature birth of her child. *Porter, Trustee, et al. v. Caylor et al.* 448.

BRIDGES—As to the construction of joint county bridges, see **STATUTORY CONSTRUCTION**, 8; **PLEADING**, 8; *Board, etc., v. Board, etc.*, 138.

BUILDING AND LOAN ASSOCIATIONS—

Foreign Association Doing Business in this State Without Complying with the Prescribed Law.—Statute Construed.—Under section 4464, *et seq.*, Burns' R. S. 1894, authorizing foreign building and loan associations to do business in this State, unless there has been a compliance with such law, a foreign building and loan association can-

not do a building and loan business in this State, such as the collection of dues, fines, premiums or other charges, but may, by virtue of the comity between the states, do business of a general character, such as loan money, take mortgage security therefor, and have judgment of foreclosure in case the debt thereby created is not paid, unless a plea of abatement is interposed.

Maine Guarantee Co. v. Cox et al., 107.

CARRIERS—

1. *Exemption of by Contract, from Liability for Negligence.*—A railroad company cannot, by a contract with a passenger, protect itself from liability resulting from its negligence, while performing a duty it owes to the public as a common carrier.

Louisville, Etc., R. W. Co. v. Keefer, 22.

2. *Under Special Contract with Express Company.*—A railroad company in carrying goods for an express company under a special agreement with such company is a private carrier of goods and is not performing a duty as a common carrier. *Ib.*

3. *Exemption from Liability by Contract.*—A contract between a railroad company and an express company, by which the latter assumed all risks and damages to its messenger while on the railroad, is binding upon an express messenger who entered into a contract with such express company, thereby assuming all risks of accidents and danger incident to such employment, however occasioned, and thereby empowering such company to enter into a contract exempting the railroad company from all liability for injuries to him. *Ib.*

CHARACTER—See REPUTATION.

CHECK—Given in payment of debt, see PAYMENT; *Sutton v. Baldwin*, 361.

CITIES—See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—Where it is sought to collaterally impeach a judgment for want of notice to the parties the complaint must allege the facts disclosed by the record of the judgment, see JUDGMENT, 4, 5; *Bailey et al. v. Rinker et al.*, 129.

Judgment by Default.—Quieting Title.—An order setting aside a judgment by default can not be collaterally attacked in a subsequent action to quiet title. *Winer et al. v. Mast*, 177.

COMMISSIONERS' COURT—Where the board of commissioners fail to meet in special session to try a contested election case, the same may be tried at the regular session of such board, see NOTICE, 4; *Tombaugh v. Grogg*, 99.

Where the board of commissioners appear at the time and place fixed to try a contested election case, service of notice is thereby waived, see NOTICE; *Ib.*

Where the existing members of the board of commissioners have proper notice of the meeting of the board to hear and determine contested election cases, called by the auditor as provided by statute, no further notice need be served on new members who become such before the meeting, see NOTICE, *Ib.*

1. *Extension of Trial Beyond Regular Term.—Statute Construed.*—Section 1379, R. S. 1881 (1442, Burns' R. S. 1894) which provides

that, if at the expiration of any term of court the trial shall be progressing, the court may continue its sitting beyond such time, is applicable to the board of commissioners when sitting as a court in the trial of a cause. *Ib.*

2. *Rules Governing*.—A board of county commissioners sitting as a court for the trial of a contested election case has the same power to make and correct its entries to conform to the facts, and is governed by the same rules in the exercise of such power as the circuit court, and the presumption will be indulged in favor of a *nunc pro tunc* entry by it, that it was made upon proper evidence, and that it states the facts as they occurred in the cause. *Ib.*

COMPLAINT—Sufficiency of, in assumpsit, see **ASSUMPSIT**; *Field v. Brown et al.*; 293.

Necessary allegations in an action to reform a written instrument, see **EQUITY**, 7; *Citizens' National Bank of Attica v. Judy et al.*, 322.

A complaint to rescind a contract for the dissolution of a partnership on account of fraud may be amended so as to become a complaint for damages for fraud, see **PLEADING**, 9; *Cohoon v. Fisher*, 583.

Necessary allegations, in an action for negligence, see **PLEADING**, 1, 2, 8; *Baltimore, etc., R. W. Co. v. Young*, 374; *Louisville, etc., R. W. Co. v. Bates, Admr.*, 564.

Necessary allegations as to knowledge of defect in machinery, in an action for personal injuries, see **MASTER AND SERVANT**, 1; *Burns v. Windfall Mfg. Co.*, 261.

Sufficiency of, in an action against a natural gas company for failure to supply sufficient gas for fuel, see **DAMAGES**, 3; *Coy v. Indianapolis Gas Co.*, 655.

A complaint for personal injuries received at a railroad crossing by reason of the failure of defendant to give signals must allege that the injury was due to the omission of defendant to give such signals, see **RAILROAD CROSSING**; *Baltimore, etc., R. W. Co. v. Young*, 374.

Sufficiency of, in an injunction proceeding, see **INJUNCTION**; *Home Electric Light, etc., Co., v. Globe Tissue Paper Co.*, 673.

Sufficiency of, in an action to set aside an executor's sale of real estate, see **JUDGMENT**, 4; *Bailey et al. v. Rinker et al.*, 129.

Sufficiency of, in an action to quiet title to real estate, see **QUIETING TITLE**, 1; *Tolleston Club v. Clough*, 93.

A complaint in an action to impeach a judgment for want of notice to the parties against whom it is rendered must allege what the record of the judgment sought to be impeached discloses, or the complaint will be bad, see **JUDGMENT**, 5; *Bailey et al. v. Rinker et al.*, 129.

CONSIDERATION—When parol evidence is admissible to show, see **EVIDENCE**, 1; *Smith v. McClain et al.*, 77.

CONSTITUTIONAL LAW—When the validity of an Act of the General Assembly will not be passed upon by the Supreme Court, see **STATUTORY CONSTRUCTION**, 7; *Board, etc., v. Board, etc.*, 138. Where a clause is taken from a constitution or statute of another state it will be deemed to have the meaning given it by the courts of that state, see **STATUTORY CONSTRUCTION**, 10; *City of Laporte v. Gamewell Fire Alarm Tel. Co.*, 466.

The Act of April 8th, 1885 (Sections 5511, 5512, 5529, Burns' R. S. 1894) prescribing the duties of telegraph and telephone companies is not unconstitutional as embracing two subjects, see **TELEGRAPH AND TELEPHONE COMPANIES**, 1; *Cent. Union Tel. Co. v. Fehring*, 189.

CONTEMPT—

Imprisonment.—Imprisonment for contempt of court in failing to pay money as ordered by the court is not imprisonment for debt within the meaning of the constitution. *Stonehill v. Stonehill*, 445.

CONTRACTS—A railroad company may by contract with an express company exempt itself from liability for injuries resulting to latter's employes, see **CARRIERS**, 2, 3; *Louisville, etc., R. W. Co. v. Keefer*, 22.

Remedy when construction of free gravel road is not in compliance with the contract, see **FREE GRAVEL ROADS**, 4; *Goodwin et al. v. Board, etc.*, 164.

1. *Consideration.*—W. and C. are the owners of adjoining unimproved lots. They enter into an agreement whereby W. in the construction of a building on his own lot is to construct a wall on the partition line, which wall is to be used by both, when C. has erected an adjoining building. Until the erection of such adjoining building and a permanent stairway built, W. to have the right to maintain over the land of C. an outside stairway. Acting upon this agreement W. constructs the building including the outside stairway. *Held*, That the contract is supported by a valuable consideration. *Joseph et al. v. Wild*, 249.

2. *Not Rescinded Because Parties Did Not Foresee all Consequences.*—An agreement between two persons supported by a sufficient consideration, by which one is allowed to maintain an outside stairway to his building over the land of the other, will not be rescinded on the ground that the land has greatly increased in value since the agreement was made. *Ib.*

CONTRIBUTORY NEGLIGENCE—See **NEGLIGENCE**.

1. *Special Verdict.—Damages.*—In an action for personal injuries to plaintiff's ward, the special verdict returned by the jury showed that such ward, a boy fifteen years of age, purchased an excursion ticket from Anderson, Indiana, to Benton Harbor, Michigan, and return; that he entered one of the coaches and seated himself, that when the train reached Alexandria, a station about 12 miles from Anderson, the coach in which he was seated was detached from the train and left upon the side-track, and the passengers in this coach were instructed to go into another coach; on entering the coach as directed he found all of the seats occupied and the aisle thereof filled with passengers; after standing in the car for some time he became sick, and believing that he would be compelled to vomit, and in order to avoid soiling the car and persons standing near him, he voluntarily left the car and went out on the steps leading to the ground, and while

thus standing on the lower step, by a sudden jerk of the car, he was thrown to the ground and was injured; the jury also found that there was ample room in the car for him to ride and that if he had remained in the car he would not have been injured and that "it was not a safe place to stand where he did even if the train ran smooth and did not jerk."—*Held*, that the facts disclosed by the special verdict show a clear and undoubted case of contributory negligence upon the part of ward.

Cleveland, Etc., R. W. Co. v. Moneyhun, Gdn, '147.

2. *Railroad*.—In an action against a railroad company for the alleged negligent killing of a section hand, freedom from contributory negligence is not sufficiently shown where there is no evidence as to what deceased was doing at the time he was struck by the train.

Fisher, Admr., v. Louisville, Etc., R. W. Co., 558.

CONVEYANCE—See DEED.

When a conveyance is made to one person and the consideration therefor paid by another, no use or trust results in favor of the latter unless it is made to appear that by agreement without any fraudulent intent the person to whom the conveyance is made was to hold the land in trust for the one paying the purchase money, see TRUSTS; *Barber et al. v. Barber et al., 390.*

CORPORATION—

1. *May Deal with Its Property as an Individual When Not Restrained by Statute*.—A private corporation, unless restrained by statute, may legitimately deal with its property in the same manner that an individual deals with his.

Levering et al. v. Bimel et al., 545.

2. *Insolvency.—Trust.—Creditors*.—An insolvent corporation does not hold its property in trust or subject to a lien in favor of creditors in any other sense than does an individual debtor. *Ib.*
3. *Insolvency.—Preferences.—Directors*.—A preference made by an insolvent corporation to some of its directors, who voted in favor thereof, is not invalid where the vote of such directors was not necessary to the passage of the resolution authorizing the preference. *Ib.*

COUNTY—When a proper party plaintiff, see FREE GRAVEL ROADS, 1; *Goodwin et al. v. Board, etc., 164.*

COUNTY CLERK—Is liable to a *bona fide* purchaser of real estate against which a judgment lien existed, but which he failed to enter on the judgment docket, for the amount of damages sustained by reason of such neglect, see JUDGMENT, 2; *Johnson et al. v. Schloesser, 509.*

COUNTY SURVEYOR—

Location of Meander Line.—Boundary.—The location of a meander line by a county surveyor cannot establish that meander as a boundary unless the notice and other proceedings show that such was the purpose of the survey. *Tolleston Club v. Clough, 93.*

COURTS—

1. *Jurisdiction.—Injunction*.—The process of one court cannot be used to enjoin the final process of another of equal jurisdiction, although the judgment on which such final process is based is void. *Scott et al. v. Runner, etc., 12.*

2. *Special Judge.*—The regular judge of a circuit court, who, because of his disqualification, appointed a special judge to hear an action for the foreclosure of a mortgage, may after a decree of foreclosure and a personal judgment in the action, and at the same term of court, appoint another special judge to hear an application for the appointment of a receiver of the rents of the land, and such latter appointee has jurisdiction to hear and determine the application.

Harris et ux. v. United States Savings Fund, etc., Co., 265.

COURT STENOGRAPHER—

Section 1, Act of March 7, 1878 (Acts 1878, p. 194) relating to the employment of shorthand reporters by parties in trial court has not been repealed. *Beatty v. Miller, 231.*

CRIMINAL LAW—

1. *Appeal.*—Where in a criminal case the record clearly discloses that a fair and impartial trial has been had, the court will disregard errors which have not prejudiced the substantial rights of the defendant, but on the other hand, where it does not appear clearly from the evidence that the defendant was guilty, the court must scrutinize carefully the errors complained of to determine whether they are of such a character that defendant may have suffered from them. *Stalcup v. State, 270.*
2. *Affidavit and Information.*—*Not Necessary to File in Open Court.*—It is not necessary that an affidavit and information be filed in open court, a filing in term time in clerk's office is sufficient. *State v. Duggins, 427.*
3. *Affidavit and Information.*—*Order-Book Entry, Filing Of.*—An order-book entry of the filing of an affidavit is unnecessary. The mere statement of the clerk that the same was filed as shown by his file-mark is *prima facie* sufficient to give jurisdiction. *Ib.*
4. *Affidavit and Information.*—An information need not state that it was filed when the court was in session, and that the grand jury had been discharged for the term. *Ib.*
5. *Rape.*—*Sufficiency of Affidavit and Information.*—An affidavit and information charging that defendant "did then and there unlawfully, feloniously and in a rude, insolent and angry manner touch, strike, pull, push, grasp and wound one A., a woman then and there being, with intent then and there and thereby unlawfully, feloniously, forcibly and against her will to ravish and carnally know her," etc., contains the essential elements of an assault and battery with intent to commit a rape. *Ib.*

CUSTOM—May be proved as a fact, see EVIDENCE, 5; *Conner v. Citizens' Street R. W. Co., 430.*

DAMAGES—

1. *Personal Injuries.*—*Shortening of Life.*—In an action for damages for personal injuries the fact that the life of the injured person has been shortened cannot be taken into consideration in the assessment of damages, except for the purpose of showing the extent of the injuries complained of. *Richmond Gas Co. v. Baker, 600.*
2. *Action in Tort.*—*Scope of Damages.*—*Proximate Cause.*—In an action in tort all damages directly traceable to the wrong done and arising without an intervening agency and without fault of the injured party are recoverable. *Coy v. Indianapolis Gas Co., 655.*
3. *Complaint.*—*Sufficiency Of.*—*Death from Failure of Gas Company to Supply Fuel.*—*Proximate Cause.*—A complaint against a natural gas company engaged in furnishing gas, and which had

contracted to supply plaintiff with gas for fuel, which alleges that defendant failed and refused to supply plaintiff with gas during cold winter weather, and after receiving notice from plaintiff of its failure to supply gas and of plaintiff's inability to procure fuel elsewhere, and of the sickness of his children, and which alleges that as a result of such failure plaintiff's house became cold and his children who were sick took a relapse from such sickness and died, is sufficient against a demurrer, and such failure on the part of defendant to supply fuel is held to be the proximate cause of the relapse and death of plaintiff's children. *Ib.*

DECEDENT'S ESTATES—

Sale of Real Estate to Pay Debts.—Descent.—Where in an action by administrator to sell real estate to pay debts, the wife and judgment creditors of one of the heirs appear and become parties to the proceedings, the judgment creditors asking that their respective liens be transferred to the proceeds of the sale, and the wife claiming that she is entitled to one-third of the surplus of the proceeds, and it is agreed in open court that the sale should take place and the rights of all parties be transferred to the fund, and the sale is accordingly made, and thereafter the wife dies, her interest, if any, in such fund does not go to her personal representative, but in accordance with section 2671, Burns' R. S. 1894, descends to her husband. *Herrick, Admr. v. Flinn, Admr., 258.*

DEDICATION—

1. *Acceptance.*—In order to constitute a complete and valid dedication of land to the public, it must be shown that the owner of the land clearly and unequivocally indicated by his words or acts to dedicate same, and there must also be an acceptance thereof by the public.

Steinauer v. City of Tell City et al., 490.

2. *Revocation.*—The owner of lands dedicated to the public may at any time prior to the acceptance thereof by the public revoke such dedication. *Ib.*

3. *Town Plat.—Acceptance.—Revocation.*—Where a town plat did not separate a small triangular lot at the intersection of two streets from the streets, and two years after the recording of such plat, a corrected plat was made and recorded which did reserve such strip of land, the making and recording of said first plat did not constitute a dedication of such strip of land to the public, where there was no evidence that the owner intended to dedicate same to the public and no evidence of an acceptance thereof by the public. *Ib.*

DEEDS—A particular reference to lots in a deed controls the general description, see REAL ESTATE; *Tolleston Club v. Clough, 93.*

1. *Delivery.—Parol Agreement to Convey Real Estate.*—A parol agreement to convey real estate, followed by the signing and proper acknowledgment of a deed which is never delivered, vests no title in the grantee. *Rogers et al. v. Eich, 235.*

2. *Delivery.*—Where a grantor executes a deed, reserving no right to recall the deed or alter its provisions, and delivers it to a third person to hold until his death and then deliver same to grantee, the delivery thereof as directed constitutes an effectual legal delivery, and on the death of grantor the grantee succeeds to the title.

Stout v. Rayl et al., 379.

3. *Validity Of.—Delivery to Third Person for Benefit of Grantee.*—Where, after the execution of a deed, the grantor handed the

deed to his wife saying, "take it and keep it in a safe place until my death, then deliver it to B. F. Wells," endorsed on the deed were the words "after my death this deed to be delivered by B. F. Wells," and the wife kept the deed as directed, and at the death of grantor delivered same to B. F. Wells, who, after having it recorded, delivered it to grantee, such deed is not invalid as an attempt by grantor to make a testamentary disposition of the land without the legal formalities of a will. *Ib.*

4. *Evidence*.—By the execution of a deed the preliminary contract is executed, and any inconsistencies between its terms and those of the deed are to be explained and settled by the deed alone.

Smith v. McClain et al., 77.

5. *Declaration of Party in Possession of Real Estate*.—*Evidence*.—The declarations of a party in possession of real estate, showing the character of his possession and the title by which he held are competent as evidence against those claiming under him, except such evidence cannot be given to sustain or destroy the record title. *Ib.*

6. *Bona Fide Purchaser*.—*Statutes Construed*.—Under sections 3343-3348 Burns' R. S. 1894, the grantee in a quit-claim deed may become a *bona fide* purchaser the same as under any other form of conveyance. *Ib.*

7. *To Childless Second Wife by Husband's Children*.—Where a husband dies intestate leaving two children and a childless second wife as his heirs at law, and the two children by quit-claim convey "all the right, title and interest" which they have as such heirs in a certain tract of land to the childless second wife, such conveyance vests in her a fee-simple title to the undivided two-thirds interest of the children. *Ib.*

DELIVERY—Of deed to third person, to be delivered to grantee at death of grantor, see **DEED**, 2 and 3; *Stout v. Rayl et al.*, 379.

DEMAND—Need not be alleged in complaint for money had and received, where complaint alleges receipt of money by defendant for use of plaintiff, see **ASSUMPSIT**; *Field v. Brown et al.*, 293.

DEMURRER—A judgment will not be reversed on account of the informality of, see **PRACTICE**, 5; *Gingrich et al. v. Gingrich*, 287.

DESCENT AND DISTRIBUTION—As to the heirs of a childless second wife, see **STATUTORY CONSTRUCTION**, 5; *Smith v. McClain et al.*, 77.

1. *From Childless Second Wife to Adopted Child*.—*Forced Heirship*.—*Statutes Construed*.—An adopted child under the provisions of section 825, R. S. 1881 (837, Burns' R. S. 1894) is entitled to inherit the same as a natural child in lands descending at the death of the adopting father to a childless second wife, which, under section 2487, R. S. 1881 (2644, Burns' R. S. 1894) at the death of such childless second wife descends to his children.

Patterson et al. v. Browning, 160.

2. *Adopted Child*.—*Forced Heirship*.—*Second Adoption*.—An adopted child of the deceased husband did not lose her right under section 2487, R. S. 1881 (2644, Burns' R. S. 1894) as forced heir of the second wife to the realty which descended to such wife at the death of her husband without children by her, by the child's subsequent adoption by the man whom the widow married. *Ib.*

DESERTION—When a wife by the cruelty of her husband is driven from their home the law makes him and not her the deserter, see **HUSBAND AND WIFE**, 2; *Porter, Trustee, et al. v. Caylor et al.*, 448.

DIVORCE—

Custody and Support of Minor Child.—Attachment for Contempt of Court.—Statute Construed.—The court may, under the provisions of section 1058, Burns' R. S. 1894 (1046, R. S. 1881), in decreeing a divorce, commit the custody of a minor child to the mother and require the father to contribute to the support of such child and upon failure of the father to comply with such order of court an attachment may be issued against him for contempt of court. *Stonehill v. Stonehill*, 445.

DRUNKARDS—The reformation of a habitual drunkard is presumed from the discharge of his guardian, see **GUARDIAN AND WARD**, 5; *Makepeace v. Bronnenberg et al.*, 243.

Guardian of habitual drunkard is invested with all the powers of a guardian of a minor, see **GUARDIAN AND WARD**, 6; *Ib.*

EASEMENT—An executed parol license may become an easement on the land of another, see **LICENSE**, 2; *Joseph et al. v. Wild*, 249.

EJECTMENT—

1. **Improvements.—Tax Title.**—An invalid tax deed constitutes a colorable title under the provisions of section 1098, Burns' R. S. 1894, which will entitle the holder to recover in ejectment for improvements made by him upon the land.

Fish v. Blasser et ux., 186.

2. **Plaintiff Must Have Title at Commencement of Action.**—In order to maintain an action for the possession of real estate the plaintiff must have title at the commencement of the action. A finding that plaintiff became the owner at a time prior to the commencement of the action is not sufficient.

Craig v. Bennett, 574.

ELECTIONS—Statutes providing for contesting elections are liberally construed, see **STATUTORY CONSTRUCTION**, 6; *Tombaugh v. Grogg*, 99.

ELECTION OF REMEDIES—

1. **When Prosecution of Concurrent Remedy is Barred.**—The prosecution of one remedy must either be pending or have been prosecuted to final determination to bar or exclude another concurrent remedy for the same right. *Cohoon v. Fisher*, 583.

2. **Estoppel.**—When a party joins in a complaint as plaintiff, and by leave of court dismisses his complaint in order to join in a cross-complaint as a defendant, it does not amount to a conclusive choice or election of remedies so as to estop him from becoming defendant and setting up matters involved in his cross-complaint.

McCoy et al. v. Stockman et al., 668.

EQUITY—

1. **Reformation of Mortgage.—Mutual Mistake.**—When it appears that by mutual mistake of all the parties to a mortgage as to a matter of fact, the instrument does not express their agreement, a court of equity will reform the instrument by correcting such mistake. *Citizens' National Bank of Attica v. Judy et al.*, 322.

2. **Reformation of Mortgage.—Subsequent Purchasers.—Judgment Creditors.—Notice.**—A mutual mistake of all the parties to a mortgage may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the facts and against judgment creditors of the mortgagor or such purchaser with notice. *Ib.*

3. *Reformation of Mortgage.—Mutual Mistake.—Consideration.*—Any consideration that will support a mortgage is sufficient to entitle the mortgagee to maintain an action to correct a mutual mistake in the same against the mortgagor and those holding under him as purchasers with notice and their judgment creditors. *Ib.*
4. *Reformation of Contracts.—When Demand is Necessary.*—Where the only relief sought is the reformation of a deed, mortgage, or other contract, a previous demand is essential, but where, in addition to the reformation, a recovery is demanded, no prior demand is necessary. *Ib.*
5. *Laches.*—While equity aids the vigilant, courts of equity have never fixed any definite or specific period of delay that, like the statute of limitations, will bar the right to equitable relief from fraud or mistake. *Ib.*
6. *When Contract May Be Reformed.*—Equity will reform a written contract between the parties whenever, through mutual mistake, or mistake of one of the parties accompanied by fraud of the other, it does not, as reduced to writing correctly express the agreement of the parties. *Ib.*
7. *Action to Reform Written Instrument.—Complaint.*—In an action to reform a written instrument the plaintiff must set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out with clearness wherein was the mistake. *Ib.*
8. *Reformation of Mortgage.—Mutual Mistake.—Must Have Been Agreement Prior to Execution of Mortgage.*—Where a creditor without any previous agreement, express or implied, prepared a mortgage covering only a part of a debtor's lands, and presented same to such debtor, the creditor believing that all of debtor's lands had been included in the mortgage, the debtor not knowing the intention of the creditor except as revealed by the written instrument, executed and delivered the mortgage, an action for the reformation of the mortgage on the ground of mutual mistake can not be maintained. *Ib.*

EVIDENCE—Objections to the admission of evidence, not stated at the time it is objected to, cannot be urged on appeal, see **APPEAL AND ERROR**, 14; *Stout v. Rayl et al.*, 379.

Parol evidence not admissible to vary the terms of a deed, see **DEED**, 4; *Smith v. McClain et al.*, 77.

Declarations of party in possession of real estate, when admissible, see **DEED**, 5; *Ib.*

It is harmless to reject admissible evidence where it is clear that the admission thereof would not have changed the result, see **HARMLESS ERROR**, 4; *Conner v. Citizens' Street R. R. Co.*, 430.

Incorporation of documentary evidence in bill of exceptions, see **APPEAL AND ERROR**, 7; *Boos v. Morgan et al.*, 111.

On appeal from an interlocutory order the Supreme Court will not determine the weight of conflicting affidavits, see **AFFIDAVIT**; *Home Electric Light, Etc., Co. v. Globe Tissue Paper Co.*, 673.

1. *Consideration.*—Parol evidence as to the true consideration of a deed is not competent to defeat the operation of the deed as a valid and effective grant. *Smith v. McClain et al.*, 77.
2. *Executed Parol Agreement.—Contemporaneous Written Obliga-*

tion.—An executed parol agreement may be proven even as against a written obligation contemporaneous with the parol agreement.

First National Bank v. New, 411.

3. *Criminal Law.—General Reputation of Defendant.*—The reputation of a defendant in a criminal prosecution, for peace and quiet, can be shown only by proof of his general reputation in that respect, and not by proof of particular acts. *Stalcup v. State, 270.*
4. *Homicide.—Evidence.—Reputation of Deceased.*—The general reputation of the deceased for peace and quiet cannot be shown in a murder trial by testimony as to a particular instance of good conduct. *Ib.*
5. *Custom May be Shown as a Fact.*—A custom or usage is a fact that may be stated by a witness in the first instance without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom. *Conner v. Citizens' Street R. R. Co., 430.*
6. *Special Verdict.—Sufficiency Of.*—All of the allegations of a complaint are not required to be found in a special verdict, but it is sufficient if the facts found constitute a cause of action within the allegations of the complaint. *Fgirmount, etc., Agricultural Assn v. Downey, 503.*
7. *Breach of Marriage Contract.*—Where in suit for breach of marriage contract an answer is filed calling in question the good character of the plaintiff before the time of the alleged contract, it is not error to admit in evidence on the trial such answer, together with depositions taken in support thereof, even though the answer had been withdrawn before the commencement of the trial. *Beatty v. Miller, 231.*
8. *Examination of Party.—Admission in Evidence of Answers to Interrogatories.*—The defendant having the right to introduce in evidence the answers to interrogatories propounded to the plaintiff in accordance with section 362, Burns' R. S. 1894 (359 R. S. 1881), the plaintiff cannot complain of their introduction on the ground that they were not the best evidence. If the interrogatories were improper the question should have been raised by a motion to reject. *Combs v. Union Trust Co., Trustee, 688.*
9. *Examination of Party.—Answers to Interrogatories are Admissions.*—Answers to interrogatories propounded to a party in accordance with section 362, Burns' R. S. 1894 (359 R. S. 1881), are admissions of the party under oath, and the rule that parol evidence is not admissible to prove the contents of documents and other writings or other facts shown by the decree of a court or other public record, does not apply in all its strictness. Such admissions are received as primary evidence. *Ib.*
10. *Criminal Law.—Cross-Examination of Defendant.*—The defendant in a criminal case, who becomes a witness in his own behalf may be asked on cross-examination if a certain occurrence, not connected with the crime charged, did not take place; but the State is bound by his answer, and cannot impeach him upon such collateral matter. *Stalcup v. State, 270.*

EXECUTION—But one execution can be had on a judgment for joint trespass, and such execution discharges all other defendants, see TRESPASS, 2; *Ashcraft v. Knoblock, 169.*

EXECUTORS AND ADMINISTRATORS—

1. *Report and Resignation of Administrator, When not a Final Report.*—An administrator's report showing a complete account-

ing of all receipts and disbursements, and that no funds remain in his hands, which report is excepted to by certain claimants, and is accompanied by administrator's resignation, is not a final report within the meaning of the statute, but leaves the estate open for further administration. *Green et al. v. Brown, Admr., 1.*

2. *Sale of Real Estate Without Petition or Order of Court.*—A domestic executor may sell real estate without a petition or order of court where the will directs the sale thereof and empowers the executor to make such sale. *Bailey et al. v. Rinker et al., 129.*
3. *Sale of Real Estate by Foreign Executor.—Failure to File Authenticated Copy of Appointment.—Jurisdiction of Subject-matter.*—The failure of the circuit court to require a foreign executor to file an authenticated copy of his appointment, and the foreign will to be allowed and recorded before granting an application to sell real estate, is an irregularity, but will not amount to such an error as to deprive the court of jurisdiction over the subject-matter. *Ib.*

EXEMPTIONS—A purchaser of real estate which the vendor could have claimed as exempt from sale on execution, may maintain an action to quiet the title to such real estate if the same is commenced before the sheriff's sale, see **QUIETING TITLE, 2**; *Moss et al. v. Jenkins et al., 589.*

1. *May be Waived.—Statutes Construed.*—Under section 715, Burns' R. S. 1894, providing that property not exceeding \$600 in value, owned by a resident householder shall be exempt from sale on execution, construed with sections 725 and 726, Burns' R. S. 1894, providing that before a debtor shall receive the benefit of the exemption he shall make out and deliver to the officer holding the execution a schedule of all his property, the rights of exemption granted to the debtor is a personal privilege which he may waive or claim at his election, and a failure to claim the exemption before sale is a waiver of such right. *Ib.*
2. *Judgment or Execution in the Hands of an Officer a Lien Unless Debtor Claims Exemption.*—The fact that the value of the property of a judgment debtor is less than \$600 does not relieve such property from the lien of the judgment, or an execution in the hands of an officer. *Ib.*
3. *Action Against Officer for Selling Property Exempt from Execution.—Defense.*—An officer who is sued for a failure to levy an execution issued on a judgment upon contract may defend on the ground that the debtor was a resident householder and his property did not exceed in value the amount allowed by law as exempt from execution, the presumption being that the debtor would have claimed his exemption before sale, but if the officer makes the levy he is not liable therefor to the execution debtor unless such debtor regularly claims his exemption before the sale is made. *Ib.*
4. *Property Set Off by Officer to Householder is Free From Lien.*—After property has been set off by the sheriff under the exemption law provided by statute, as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment. *Ib.*

EXPRESS COMPANIES—Contract with railroad company exempting the latter from liability for injuries to its employes, see **CARRIERS, 2 and 3**; *Louisville, Etc., R. W. Co. v. Keefer, 21.*

FELLOW SERVANT—Distinguished from vice-principal, see **MASTER AND SERVANT, 5 and 6**; *Robertson v. Chicago, Etc., R. R. Co., 486.*

FORMER ADJUDICATION—

Motion to Vacate Judgment.—Where at the same term of court at which a judgment by default was taken, a motion made to set aside such default is heard and overruled, the overruling of such motion is a final judgment and is a bar to another proceeding for the same purpose. *Moore v. Horner, 287.*

FRAUD—The facts constituting the fraud relied upon must be distinctly averred, see PLEADING, 6, 7; *Guy et al. v. Blue et al., 629.*

Attorney and Client.—Excessive Fees.—Where an attorney at law makes false statements to his client as to the value of land of which such client is an heir, and as to the value of attorney's fees in asserting claim against an adverse claimant, and falsely states to such client that such adverse claimant has employed all the attorneys in the town, such client being uneducated and uninformed as to the value of the land, and uninformed as to what steps had been taken in the premises by the adverse claimant, such false statements on the part of the attorney constitute fraud, available as a defense to a note given to the attorney for excessive fees. *Manley v. Felty, 194.*

FREE GRAVEL ROADS—

1. *Proceedings for Additional Assessment.—County a Proper Party Plaintiff.*—The county has such interests in the proceedings under sections 6860, *et seq.*, Burns' R. S. 1894, for the reassessment of lands benefited by and for the cost of constructing a free gravel road in excess of the estimated cost, as will entitle the board of county commissioners to be made a party plaintiff, although the county cannot ultimately be required to bear any part of the cost of such road. *Goodwin et al. v. Board, etc., 164.*
2. *Construction Of.—Reassessment by County Commissioners.*—The board of commissioners of a county has the power to cause a reassessment against the lands benefited, to cover such additional cost of construction as might be found to exceed the original estimate. *Ib*
3. *Additional Assessment of Benefits.—Defenses.*—In proceedings for a reassessment to cover additional costs of construction of a free gravel road there is no question open except the validity and amount of the additional assessment. *Ib*
4. *Construction Not in Compliance with Contract.—Remedy.*—If a free gravel road when completed is not up to the standard contracted for, the remedy is upon the contractor's bond. *Ib*
5. *Objections to Petition.—When Presented.—Statutes Construed.*—Objections to a petition for the construction of a free gravel road under sections 6879-6899, Burns' R. S. 1894, that the same was not signed by a majority of the resident land owners whose lands were within two miles of the proposed improvement, to be available must be made prior to the report of the viewers.

Miller et al. v. Burks et al., 219.

GAS COMPANY—When liable for injuries sustained by reason of explosion of escaping gas, see NEGLIGENCE, 6, 7; *Richmond Gas Co. v. Baker, 600.*

GENERAL DENIAL—An argumentative denial if otherwise good is sufficient to withstand a demurrer, see PLEADING, 10; *Smith v. McClain et al., 77.*

Under general denial defendant may introduce proof of facts independent of those alleged in the complaint and inconsistent therewith, see PRACTICE, 6; *Jeffersonville Water Supply Co. v. Riter*, 521.

GRAVEL ROADS—See FREE GRAVEL ROADS.

GUARDIAN AND WARD—

1. *Sale by Guardian of Ward's Real Estate, Under Order of Court.*—A purchaser of lands at a guardian's sale under an order of the court which appointed him, such court having general jurisdiction to appoint guardians, who pays for the land, relying in good faith on such order will be protected in the title so acquired, if the guardian applies properly the proceeds of such sale, although the court was without jurisdiction to make the particular appointment. *Decker v. Fessler*, 16.
2. *Exchange of Ward's Lands for Other Lands.—Statute Construed.*—Under section 2528 R. S. 1881 (2692 Burns' R. S. 1894) providing that whenever a better investment of the value of a ward's real estate can be made, the proper court may, on the application of the guardian, order the same or a part thereof to be sold, the court may direct an exchange of the lands of the ward for other lands. *Ib.*
3. *Appointment of Guardian for Minor Female Whose Husband is Also a Minor.—Statute Construed.*—Section 2526, R. S. 1881 (2690, Burns' R. S. 1894), which provides that the marriage of a female ward to a person of full age shall operate as a legal discharge of the guardianship is no limitation on the power of the court to appoint a guardian of the estate of a minor female whose husband is also a minor. *Ib.*
4. *Action by Guardian for Injury to Ward—Statute Construed.*—Under the provisions of section 266, R. S. 1881 (267, R. S. 1894) the guardian of an infant who has received a personal injury as the result of a wrongful act of another, may maintain an action against the wrongdoer for the recovery of such damages as are personally sustained by his ward. *Cleveland, etc., R. W. Co. v. Moneyhun, Gdn.*, 147.
5. *Habitual Drunkard.—Limitation of Action.—Statute Construed.*—A habitual drunkard under guardianship is not under legal disability within the meaning of section 297, Burns' R. S. 1894. *Makepeace v. Bronnenberg et al.*, 243.
6. *Habitual Drunkard.—Discharge of Guardian.—Presumption.*—The discharge of a guardian appointed for a habitual drunkard will be presumed to be the result of a finding in accordance with section 5745, Burns' R. S. 1894, that the ward had reformed by abstaining from the use of intoxicating liquors. *Ib.*
7. *Habitual Drunkard.—Powers and Duties of Guardian.*—The guardian of a habitual drunkard is invested with all the powers of a guardian of a minor, and under the provisions of section 2685, Burns' R. S. 1894, it is his duty to appear and defend all suits against his ward. *Ib.*

HARMLESS ERROR—

1. *Jury in Cause Triable by Court.*—Where in an action on notes, and to set aside a conveyance as fraudulent, triable by the court, and the jury, called to determine certain questions of fact, were instructed to return a general verdict as to the notes, instead of being directed to find on the particular questions of fact, and the court disregarded the verdict of the jury, the error was harmless. *Hornbrook v. Powell et al.*, 39.

2. *Swearing of Jury in Cause Triable Only by Court.*—Where in an action, triable only by the court, a jury is called to determine certain questions of fact, and are erroneously sworn to “well and truly try the cause now in hearing,” etc., and the court in rendering judgment disregards the verdict of the jury, and makes a finding for itself on every question, the error, if any, is harmless. *Ib*
3. *Appeal.—Elections.*—Where in an election contest, the election returns showed that contestee had received a majority of four votes, it was harmless error to exclude evidence tending to show that two of the votes cast for the contestee were illegal.

Groff v. Clark, 52.

4. *Evidence.*—It is harmless error to reject admissible evidence where it is clear that the admission of the evidence would not have changed the result. *Conner v. Citizens' Street R. R. Co., 430.*

5. *Rejected Evidence.*—The rejection of proper evidence is harmless where other questions were afterwards put to the same witness in better form that elicited all the testimony that the rejected question could have elicited. *Ib*

6. Overruling a demurrer to a bad answer will not be presumed harmless unless the evidence as set out in the record shows that the cause was properly tried and determined upon its merits.

Pyle v. Peyton, 90; City of Decatur v. Grand Rapids, etc., R. R. Co. et al., 577.

7. Error in sustaining a demurrer to one paragraph of answer is harmless where all the evidence which could have been given thereunder is admissible under a general denial which is pleaded.

Jeffersonville Water Supply Co. v. Riter et al., 521; Joseph et al. v. Wild, 249.

HUSBAND AND WIFE—When property of wife goes to husband instead of personal representatives, see DECEDENT'S ESTATES; *Herrick, Admr., v. Flinn, Admr., 258.*

The wife of a purchaser of lands sold under a foreclosure of a mechanic's lien acquires no interest in such lands as against a prior mortgagee thereof, see JUDICIAL SALE, 1; *Vandevender et al., v. Moore et al., 44.*

1. *Wife's Separate Estate.—Widow Remarrying.—Right of Alienation.—Descent.*—The provision of section 2641, Burns' R. S. 1894 (2484, R. S. 1881), that if a widow shall marry a second or subsequent time, holding real estate by virtue of any previous marriage, and there be children alive by such marriage, she cannot alienate such real estate during such second or subsequent marriage, does not preclude her from leasing the real estate for the period of her natural life. *Forgy v. Davenport, 399.*

2. *Cruelty.—Desertion.*—When a wife by the cruelty of her husband is driven from their home, the law does not regard this as desertion on her part. *Porter, Trustee, et al., v. Caylor et al., 448.*

IMPEACHMENT—The defendant in a criminal prosecution, who becomes a witness in his own behalf, cannot be impeached on a collateral matter, see EVIDENCE, 10; *Stalcup v. State, 270.*

INFANT—*Right of Action During Minority.—Statute Construed.*—An infant may bring an action to set aside a default and judgment against him before he attains his majority, as the statutory provision giving infants two years after becoming of age to bring suit for cause of action accrued during minority does not prevent the bringing of actions before becoming of age.

Winer, et al., v. Mast, 177.

INJUNCTION—An action will not lie against a city to enjoin the collection of a sewer assessment unless the common council was without jurisdiction to enter into the contract to build the sewer, see **MUNICIPAL CORPORATIONS**, 9; *Alley v. City of Lebanon et al.*, 125.

By one court to enjoin the process of another of equal jurisdiction, see **COURT**, 1; *Scott et al. v. Runner et al.*, 12.

An injunction restraining county treasurers from collecting taxes assessed against a telegraph company does not prevent an action to recover the same in the name of the State under section 8488, Burns' R. S. 1894, see **TELEGRAPH AND TELEPHONE COMPANIES**, 2; *W. U. Tel. Co. v. State*, 54.

Will not lie against the purchaser of personal property belonging to an insolvent partnership, on the ground that such purchaser is insolvent and that the purchase was made through an insolvent partner, unless fraud, or injury to the partnership is shown; *O'Toole et al. v. Howery*, 685.

Appeal from Interlocutory Order Overruling a Motion to Dissolve.—Sufficiency of Complaint.—A complaint for injunction first attacked on appeal from the court below for refusal to dissolve a temporary restraining order, need not make out a case which would entitle the plaintiff to relief at all events at the hearing, but will be sufficient if the facts averred show a proper subject for investigation in a court of equity.

Home Electric Light, etc., Co. v. Globe Tissue Paper Co., 673.

INSTRUCTIONS—Where exception is made to the instructions given as an entirety, see **APPEAL AND ERROR**, 4; *State v. Ray*, 500.

When erroneous instruction not available error, see **APPEAL AND ERROR**, 17; *Board, etc., v. Bonebrake*, 311.

1. *When Not Reviewable on Appeal.*—When it is not shown by the record that all the instructions given by the trial court are in the transcript, the refusal of the court to give certain instructions offered is not reviewable on appeal.

Conner v. Citizens Street R. R. Co., 430.

2. *Accident.*—An instruction to the jury that if plaintiff was injured as alleged and the injury was accidental, defendant would not be liable, is not erroneous where the whole instruction shows that the word "accidental" was used in the popular sense to signify something resulting undesignedly and without the fault of either party. *Ib.*

3. Where the court of its own motion gave instructions numbered 1 to 6 and at the request of the plaintiff another set of instructions numbered 1 to 10, an assignment of error that "the court erred in giving instructions numbered 1 to 6 inclusive refers to those given on court's own motion. *Bower, et al., v. Bower, et al.*, 393.

INTERROGATORIES TO JURY—May be rejected by the court where there are other interrogatories covering the same facts, see **PRACTICE**, 12; *Board, etc., v. Bonebrake*, 311.

1. *When Improper.*—In an action for damages for personal injuries the following interrogatory to the jury, "Was not said injury received without any fault or negligence of the defendant?" is improper as involving both the law and the facts. *Ib.*

2. *Ultimate Conclusion of Fact.*—Where, in an action against a county for damages for personal injuries resulting from a defective bridge, it was found that the injuries resulted from the decayed condition of the bridge, of which the defendant had knowledge and failed to repair, and that the plaintiff had no knowledge of the defects, that he went over the bridge slowly and carefully, and that he could not have seen the defects, an interrogatory to the jury calling for an ultimate conclusion of fact as to plaintiff's contributory negligence is improper.

Ib.

3. *Special Verdict.*—In an action against a county for damages for personal injuries sustained by reason of a defective bridge, an interrogatory, "Was not plaintiff's fall and injury occasioned solely by reason of the rotten, defective and doty condition of the timbers of said bridge, and the failure of the defendant to repair the same?" does not submit a question of law to the jury, and is not in violation of the act of March 11, 1895, prescribing that each interrogatory to the jury be so framed as to require the finding of but one fact.

Ib.

INTERROGATORIES TO PARTY—As to the admission in evidence of the answers to, see EVIDENCE, 8 and 9; *Combs v. Union Trust Co., Tr.*, 688.

INTOXICATING LIQUORS—

1. *Remonstrance.—Right of Remonstrators to Withdraw Their Names.*—Under section 9, Acts 1895 (Acts 1895, p. 248), providing for the filing of a remonstrance against the granting of a liquor license, remonstrators have no right to withdraw their names from the remonstrance after the beginning of the three days' period when the remonstrance is required to be on file,

White et al., v. Prifogle et al., 64.

2. *Remonstrance.—Statute Construed.*—Where an application is made to obtain a license to sell intoxicating liquors within the boundaries of an incorporated city, only the legal voters residing within the particular city ward in which such business is proposed to be conducted are authorized, under section 9 of an Act of March 11, 1895 (Acts 1895, p. 248), to join in a remonstrance against the granting of such license, and a majority of such voters will be required to defeat the application.

Massey v. Dunlap et al., 350.

3. *Remonstrance.—Separate Remonstrance Must Be Directed Against Each Applicant.—Statute Construed.*—Under section 9 of Act of March 11, 1895 (Acts 1895, p. 248), a remonstrance against the granting of a license to sell intoxicating liquors as provided for by said section applies to some particular applicant, and does not authorize persons remonstrating to join two or more applicants in the same remonstrance, but a separate remonstrance must be directed against each applicant.

Ib.

4. *Remonstrance.—Number of Votes to Constitute a Majority.—Statute Construed.*—The majority of voters as provided in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), required to sign a remonstrance against the granting of a license to sell intoxicating liquors is determined by the aggregate vote cast in the township for candidates for the highest office at the November election last preceding the filing of the remonstrance, where an application is made to conduct a saloon at some place in the township outside of the limits of an incorporated city; but when the applicant desires to obtain a license to conduct a saloon in a ward of an incorporated city, then the majority of voters is determined by aggregating the

vote of that particular ward as cast at the last general city election preceding the filing of the remonstrance, for the highest municipal office to be filled at such election. *Ib.*

5. *Remonstrance. — "Highest Office." — Statute Construed.*—The phrase "candidates for the highest office at the last election" as used in section 9 of Act of March 11, 1895 (Acts 1895, p. 248), was intended by the legislature to mean the Governor, if a Governor was elected at the last State election preceding the filing of the remonstrance provided for in said section, if the applicant desired to obtain a license to sell in a township beyond the limits of an incorporated city; in the event a Governor was not elected at said election, then the votes cast for Secretary of State should be the standard. When the application is for a license to conduct a saloon in an incorporated city, a majority of the legal voters of the ward must be determined by the aggregate vote cast therein for mayor at the last preceding city election; and in the event no mayor was elected at said election, then the majority must be determined in like manner by the vote cast in the ward for councilman. *Ib.*
6. *License.—Remonstrance.—When Remonstrator May Not Withdraw His Name.*—Under section 9, Act of March 11, 1895, providing that, if three days before the regular session of the board of county commissioners a majority of the legal voters shall sign and file a remonstrance, the license shall not be granted, a withdrawal of one's name cannot be made after the beginning of the third day before such meeting, and a motion signed by a number of remonstrators and filed with the board of commissioners after such time, stating that they had signed the remonstrance under "mistake and misapprehension" should be overruled.
Sutherland et al. v. McKinney, 611.

JOINDER—Of actions at law and actions in equity, see **ACTIONS**, 1; *Field v. Brown et al., 293; Bartlett et al. v. Manor et al., 621.*

JUDGMENT—A lien on debtor's real estate unless the same is claimed as exempt, see **EXEMPTIONS**, 2, 4; *Moss et al. v. Jenkins et al., 589.*

A partner has no authority to confess judgment against his co-partner, see **PARTNERSHIP**, 1; *Davenport Mills Co. v. Chambers, 156.*

A judgment against a partnership by confession of one partner is valid as to the partner confessing judgment, but void as to the partnership, see **PARTNERSHIP** 1, 2; *Ib.*

Where it is in excess of demand, presumption on appeal, see **APPEAL AND ERROR**, 20; *City of Decatur v. Grand Rapids, etc., R. R. Co. et al, 577.*

1. *Failure of Clerk to Enter on Judgment Docket.*—The lien of a judgment on real estate is not lost by reason of the failure of the clerk to enter same on the judgment docket, although such real estate has passed into the hands of a *bona fide* purchaser without notice of such judgment. *Johnson et al. v. Schloesser, 509.*
2. *Failure of Clerk to Enter on Judgment Docket.—Remedy of Purchaser of Real Estate.—Statute Construed.*—Section 594, Burns' R. S. 1894 (584, R. S. 1881), providing that, "Every clerk neglecting to enter any judgment or recognizance, as herein required, shall be liable to any person injured for the amount of damages sustained by such neglect," etc., gives to a *bona fide* pur-

chaser of real estate, against which a judgment lien existed, but which the clerk failed and neglected to enter on the judgment docket, a right of action against such clerk for the amount of damages sustained by reason of such neglect. *Ib.*

3. *Setting Aside Default.*—Where a judgment has been taken by default, and upon application of the defendant the default is set aside and the judgment opened up that it may be set aside, if the defense shall prove good, such judgment is preserved as a lien pending the litigation, but is abrogated upon the entering of a decree for defendant, even though the decree does not in express terms annul the original judgment. *Winer et al. v. Mast, 177.*

4. *Collateral Attack.—Pleading.—Complaint.*—An allegation that none of the heirs or legatees of a testator were made parties to the petition of the executor to sell real estate, is not equivalent to an allegation that they were not parties to the proceedings as disclosed by the record, essential to a complaint collaterally impeaching the decree of sale upon the ground that they had no legal notice of the filing of the petition and the pendency of the action. *Bailey et al. v. Rinker et al., 129.*

5. *Collateral Attack.—Pleading.—Complaint.*—Where it is sought to collaterally impeach a judgment for want of notice to the parties against whom it is rendered, it is not sufficient to allege generally the want of such notice, but the complaint must allege what the record of the judgment sought to be impeached discloses on the subject, or the complaint will be bad. *Ib.*

JUDICIAL SALE—

1. *Rights of Married Women.—Parties.*—The wife of a purchaser of lands sold under foreclosure of a mechanic's lien acquires no interest in such lands as against a prior mortgagee thereof, and in an action to foreclose such mortgage it was not necessary to make the wife of the purchaser at the mechanic's lien sale a party defendant. *Vandevender et al. v. Moore et al., 44.*

2. *Payment of Purchase-money.*—An execution creditor may make a valid purchase of property without paying the amount of the principal debt to the sheriff where in lieu thereof he receipts the sheriff for that amount, and where there is no question of his first right to the fund otherwise paid to the sheriff. *Boots v. Ristine, 75.*

3. *Estoppel.*—Where a sheriff received a check in payment for a deed issued under an execution sale of real estate, and thereby agreed to accept such check as so much cash, and further agreed to hold the check until next day in order that the purchaser, as a junior encumbrancer, might restrain payment to the execution creditor the amount of his said lien of such purchase-money, but the sheriff in violation of his said agreement transferred said check to plaintiff's attorney, informing him of the agreement to hold the check, and the purchaser next day, upon learning of the violation of the agreement made the night before, ordered the bank on which the check was drawn not to pay same, and such check was never returned or tendered to said purchaser, plaintiff by his conduct in receiving the check from the sheriff with a knowledge of the agreement, ratified the acts of the sheriff and is not entitled to the remedy provided by section 772, Burns' R. S. 1894 (760 R. S. 1881), for recovering judgment for the amount at which real estate is sold by the sheriff on execution. *Sutton v. Baldwin, 361.*

JURISDICTION—The record of a judgment rendered by a justice of the peace must show affirmatively that jurisdiction was ac-

quired or the judgment will be void, see **JUSTICE OF THE PEACE**; *Davenport Mills Co. v. Chambers*, 156.

JURY—As to swearing jury in cause triable by the court. see **HARMLESS ERROR**, 2; *Hornbrook v. Powell, et al.*, 39.

Where a jury called to determine certain questions of fact, in a cause triable by the court, erroneously brought in a general verdict which was disregarded by the court the error was harmless, see **HARMLESS ERROR**, 1; *Ib.*

JUSTICE OF THE PEACE—

Jurisdiction.—Unless the record of a judgment rendered by a justice of the peace shows affirmatively that jurisdiction was acquired, the same is void. *Davenport Mills Co. v. Chambers*, 156.

JUSTIFICATION—Plea of, in action for slander, see **SLANDER**; *Campbell v. Irwin*, 681.

LAW OF CASE—

Review.—A decision of the Supreme Court constitutes the law of the case, so far as the principle involved is applicable, throughout all stages of the cause thereafter; this is true regardless of whether the question arose each time in the same manner. *Board, etc., v. Bonebrake*, 311.

LEASE—Childless second wife may lease real estate held by virtue of a previous marriage for the period of her natural life, see **HUSBAND AND WIFE**, 1; *Forgy v. Davenport*, 399.

1. *Revocation.*—A license to erect an outside stairway to the upper story of a building on the land of another becomes irrevocable after the building has been erected, in reliance upon such license, at a large expense, without any other stairway.

Joseph et al. v. Wild, 249.

2. *Easement.*—An executed parol license may become an easement on the land of another and impose a servitude on one estate in favor of another. *Ib.*

LICENSE—

1. *Revocation.*—A license to erect an outside stairway to the upper story of a building on the land of another becomes irrevocable after the building has been erected, in reliance upon such license, at a large expense, without any other stairway.

Joseph et al. v. Wild, 249.

2. *Easement.*—An executed parol license may become an easement on the land of another and impose a servitude on the estate in favor of another. *Ib.*

LIEN—Of judgment on real estate not lost by failure of clerk to enter same on judgment docket, see **JUDGMENT**, 1; *Johnson et al. v. Schloesser*, 509.

An administrator may assert a lien held by the estate against real estate which has been partitioned by the heirs, the administrator not having been made a party to the proceedings, see **PARTITION**, 2; *Green et al. v. Brown. Admr.*, 1.

A judgment or an execution in the hands of an officer, a lien upon the property of debtor unless such property is claimed as exempt, see **EXEMPTIONS**, 2, 4; *Moss et al. v. Jenkins et al.*, 589.

Redemptioners, right of, see SUBROGATION; *Green et al. v. Brown Admr.*, 1.

Priority Of.—The existence of the mortgage executed by J. remaining of record unsatisfied, the foreclosure proceedings, sale and redemption, together with the administrator's report disclosing the payment by him of the money in redemption without a corresponding charge for moneys received in repayment of such redemption, were sufficient to disclose the equity in favor of the estate against J.'s interest in the land, and the estate's lien would be prior to all liens attaching subsequent to the redemption by administrator. *Ib.*

LIMITATION OF ACTION—

Taxes and Improvements Paid by One Occupying Under Tax Deed.—The right of action of an occupying claimant to recover for taxes paid and improvements made upon the land accrues when he is adjudged not to be the rightful owner thereof and a recovery of the premises awarded to the plaintiff. *Fish v. Blasser et ux.*, 186.

LIQUOR LICENSE—As to remonstrance against the issuance of, see INTOXICATING LIQUORS, 1, 2, 3, 4, 5, 6; *White, et al. v. Prifogle, et al.*, 64; *Massey v. Dunlap, et al.*, 350; *Sutherland, et al., v. McKinney*, 611.

LIS PENDENS—

Failure to File.—*Bona Fide Purchaser.*—Where a decree to enforce a vendor's lien has been reversed on appeal to the Supreme Court, and such reversal has been entered in the lower court, and no *lis pendens* notice having been filed, one purchasing the real estate against which the lien is sought to be enforced, takes it discharged of such lien. *Pennington v. Martin*, 635.

LONGHAND MANUSCRIPT—Must be filed with clerk before it is incorporated in bill of exceptions, see APPEAL AND ERROR, 11; *Rogers, et al., v. Eich*, 235; *Beatty v. Miller*, 231; *Makepeace v. Bronnenberg, et al.*, 243; *Miller, et al., v. Burks, et al.*, 219; *Manley v. Felty*, 194.

MALICIOUS PROSECUTION—A prosecuting attorney is not liable in an action for malicious prosecution for participation by him in procuring an indictment maliciously and without probable cause, see PROSECUTING ATTORNEY, 1 and 2; *Griffith v. Slinkard*, 117.

MASTER AND SERVANT—In an action based upon negligence it must be shown that the master was guilty of the negligence charged and that the servant was free from contributory negligence at the time of the alleged injury, see NEGLIGENCE, 1; *New York, etc., R. R. Co. v. Ostman, Admr.*, 452.

1. *Defective Machinery.*—*Complaint.*—In an action by an employe against his employer for personal injuries caused by defective machinery, a complaint alleging a knowledge both on the part of the employe and employer as to the defect, and a promise on the part of the employer to remedy the same, is not sufficient to withstand a demurrer unless it is further alleged that after the knowledge and promise on the part of the employer, a reasonable time had intervened before the accident for the employer to have remedied the defect. *Burns v. Windfall Mfg. Co.*, 261.

2. *Negligence of Servant.*—A servant nineteen years of age, active and intelligent, is guilty of negligence in stepping over a revolving shaft projecting fourteen inches above the floor, containing projecting oil cups and setscrews, instead of passing out by either of two other ways which were generally used, and were comparatively safe, although he testified that he was unaware of the presence of the set screw or oil cup, where the evidence showed that he had for nearly two years worked in the mill, and for three weeks in and about this particular machinery, oiling the shaft at the point where he was hurt. *Wabash Paper Co. v. Webb, 303.*
3. *Assumed Hazards.*—Where a paper mill and machinery was constructed and maintained after approved plans, although the gearings, set screws, pulleys, belts, and other exposed parts of machinery might be rendered more safe by being boxed, such extraordinary care cannot be required, and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employe. *Ib.*
4. *Railroads.—Contributory Negligence.*—A locomotive fireman who, while in the discharge of his duties as such fireman was leaning out of the window of the cab and looking backward for signals, struck his head against a cattle chute which stood 13 inches from the cab window and was killed is chargeable with a knowledge of the dangerous proximity of said chute to a passing engine and was guilty of contributory negligence in leaning out of the cab while passing said chute, where it is shown by the special finding of the jury that he had been in the employe of the defendant for 16 months and had passed the cattle chute twice each week during such time and had frequently done switching at such point and was familiar with the printed rules of the company which enjoined upon the employes to take time in all cases to do their duty in safety whether at the time acting under orders of a superior or otherwise. *New York, etc., R. R. Co. v. Ostman, Adm., 452.*
5. *Vice Principal and Fellow Servant.—How Distinguished.*—The controlling inquiry as to whether one is a fellow servant or vice principal, must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant. *Robertson v. Chicago, etc., R. R. Co., 486.*
6. *Negligence.—Fellow Servant.—Complaint.*—In an action for personal injuries, plaintiff alleged that he was a helper in defendant's shops; that G., a machinist, under whose direction he was working, and who had power to discharge those working under him, directed plaintiff in a violent manner and with profane language to lift one end of a certain steam chest cover, said machinist and foreman promising to aid plaintiff; plaintiff being excited and fearing that he would lose his employment, and in reliance upon the promised assistance of said foreman, did lift said chest cover; that said foreman did not lend him any aid, and as a result of said lifting he was severely strained and suffered a rupture; that appellant well knew that the lifting was dangerous, which fact was not known to plaintiff; and defendant knew when it employed said foreman that he was quick tempered and passionate. *Held,* that complaint showed that the negligence, if any, was that of a fellow servant, and was not sufficient to withstand a demurrer. *Ib.*

MECHANIC'S LIEN—

1. *Notice.*—A notice of intention to hold a mechanic's lien is not invalid for failure to specify when the work was done, or material furnished. *Jeffersonville Water Supply Co. v. Riter et al., 521.*

2. *Notice.—Contents Of.*—Under the statute providing for a mechanic's lien, the notice thereof is sufficient when it states the amount due, to whom, from whom, and for what, and describes the premises, and such notice may be signed through the agency of an attorney. *Ib.*

MISTAKE—A mutual mistake of all parties to a written instrument may be corrected by a court of equity, see EQUITY, 1, 2, 3, 8; *Citizens' National Bank of Attica v. Judy et al.*, 322.

MORTGAGE—When may be reformed by court of equity, see EQUITY, 1, 3, 4, 8; *Ib.*

1. *Pre-existing Debt a Valid Consideration.*—A pre-existing debt is a valid consideration for a mortgage, but is not such a consideration as will constitute the mortgagee a *bona fide* purchaser, in the sense to cut off prior equities. *Ib.*

2. *Preferences.*—Where a mortgage or other security is given to secure an honest debt, and is in a *bona fide* manner accepted for that purpose, the fact that the giving and accepting of such security may result in defeating the claims of other creditors, affords no legal or equitable grounds for complaint on the part of the latter. *Levering et al. v. Bimel et al.*, 545.

3. *Redemption.—Merger.—Inchoate Interest of Wife.*—Where a mortgagee obtains title to real estate through foreclosure of a mortgage executed by the husband, the wife not joining therein, and afterward under Acts of 1861 (Acts 1861, p. 79, 2 Davis R. S. 220, 2 G. and H. 251), redeems from a sheriff's sale under foreclosure of a senior mortgage on same real estate, in which such wife did join, by paying to the clerk of the court the full amount for that purpose, the prior mortgagee accepting the money in satisfaction thereof, the lien of the mortgage did not merge as to the inchoate dower interest of the wife, but the redemptioner thereby obtained a lien on the wife's interest in said real estate, which could be divested only by redemption on the part of the owners or their privies against whom the judgment had been rendered, and upon the failure of such wife to redeem within the year of redemption, all interest in such real estate was lost to her forever.

Breedlove et al. v. Austin, 694.

MUNICIPAL CORPORATIONS—

1. *Powers Delegated to Cities by Legislature.—Limitation of Powers.—Lights at Street and Railroad Crossings.*—A statute empowering a city to require all railroad companies to maintain lights similar to those maintained by such city at streets crossed by their tracks, will authorize the passage of an ordinance providing for electric lights, where the city maintains electric lights, but not for lights of the "arc pattern."

City of Shelbyville v. Cleveland, Etc., R. W. Co., 66.

2. *Ordinance Requiring Railroad Companies to Maintain Lights at Streets Crossed by Its Tracks.*—An ordinance requiring railroad companies to maintain a light at all places where its tracks cross a street "on the same schedule plan adopted and used by said city," and imposing a fine for each night where there is a failure to provide the specified light, is bad for its failure to fix definitely the times of lighting. *Ib.*

3. *Public Safety.—Lights at Railroad and Street Crossings.—Statute Construed.*—Section 5173, Burns' R. S. 1894 (Acts 1893, p. 802) authorizing cities to provide by ordinance for the security and safety of citizens and others from the running of trains through

cities by requiring railroad companies to keep and maintain lights at points where the tracks cross a street, on all nights that the common council may direct, does not authorize the passage of an ordinance requiring railroad companies to maintain a light at every street and railroad crossing whether or not the security and safety of the citizens require it. *Ib.*

4. *Exercise of Power Conferred by Legislature.*—Where the power granted by the legislature to a city is general, and the manner of the exercise thereof left to the discretion of the city, an ordinance passed in pursuance thereof must be a reasonable exercise of the power granted. *Ib.*

5. *Powers Limited to Those Granted by the Legislature.*—Municipal corporations possess such powers only as are granted by the legislature in express words and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.

Pittsburg, etc., R. W. Co. v. Town of Crown Point, 421.

6. *Statutes Granting Powers to a Municipality Strictly Construed.*—Any doubt or ambiguity in the terms used by the legislature in granting powers to a municipal corporation is resolved against the corporation. *Ib.*

7. *Ordinances.—When Constitutional.*—An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution; while an ordinance which the municipality seeks to uphold by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial. *Ib.*

8. *Town Ordinance Requiring Railroad to Maintain Crossing Gates.—Statutes Construed.*—Sections 4404 and 4357, Burns' R. S. 1894 (3333 and 3367, R. S. 1881), do not authorize an ordinance to compel a railroad company to keep, at its own expense, a watchman and erect and maintain a gate on each side of the track at each street crossing within the corporate limits of a town. *Ib.*

9. *Public Improvement.—Sewers.—Injunction.*—An action will not lie to enjoin the collection of a sewer assessment under sections 4288-99, Burns' R. S. 1894, which provide a remedy by injunction before the making of the contract and by appeal in case a precept is issued for the collection of the assessment, unless the common council was absolutely without jurisdiction to enter into the contract for the building of the sewer.

Alley v. City of Lebanon et al., 125.

10. *Common Council.—Public Improvements.—Sewers.*—Where all the proceedings for the construction of a sewer and the making of assessments are in strict compliance with sections 4288-4299, Burns' R. S. 1894, a city council has jurisdiction to make a contract for a general sewer. *Ib.*

11. *Common Council.—City Commissioners.—Public Improvements.—Sewers.—Statute Construed.*—Under sections 4273-4275, Burns' R. S. 1894, providing a method by which the common council or town board is guided in making assessments upon the property benefited by sewer improvements, such council or town board is not required to submit the matter to the city commissioners for appraisement of benefits and damages to the property affected by the proposed improvements. *Ib.*

12. *Limitation of Indebtedness.*—A contract by a city for a fire alarm system, at a time when the city was indebted more than 2 per cent. on the assessed valuation of its taxable property, is void under the

provisions of Art. 13 of the constitution limiting municipal indebtedness to 2 per cent. of the value of the taxable property, where such city had no money in the treasury to pay for such system either at the time the contract was made or when same was completed and accepted, although there were sufficient funds on hand to pay for it at the time fixed by contract for such payment.

City of Laporte v. Gamewell Fire Alarm Tel. Co., 466.

13. *Municipal Indebtedness*.—Where a municipal corporation contracts for a usual or necessary thing and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, as such indebtedness does not come into existence until it is earned. *Ib.*

14. *Municipal Indebtedness*. — *Current Expenses*. — When the current revenues of a city are sufficient to pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred; but a debt for current expenses cannot be made beyond the constitutional limit. *Ib.*

15. *Municipal Indebtedness*.—*Payable Out of a Particular Fund*.—Municipal obligations payable out of a particular fund, and for which the fund only and not the municipality is liable, are not within the inhibition of Art. 13 of the constitution limiting municipal indebtedness to 2 per cent. of the value of the taxable property. *Ib.*

16. *Rules for Government of Common Council*. — *Ordinances*. — *Repeal*.—Rules for the government of a city council, presented in writing and adopted at a regular meeting of such council, are in effect an ordinance and cannot be repealed on a mere verbal and general motion to that effect. *Smith et al. v. Reister*, 528.

17. *Power of Common Council in Declaring What Shall Constitute a Nuisance*.—A municipal corporation although authorized by its charter to declare what shall constitute a nuisance, may not declare that to be a nuisance which in fact is not.

City of Evansville et al. v. Miller, 613.

18. *Cities*.—*Invalid Ordinance*.—*Partially Burned Building Not a Nuisance*.—Under section 23 of the act governing cities having more than fifty thousand and less than one hundred thousand population as amended by section 4 of the Act of March 11, 1895, authorizing such cities to declare what shall constitute a nuisance, an ordinance declaring a partially burnt building to be a nuisance irrespective of its actual condition or location, is invalid. *Ib.*

MUNICIPAL INDEBTEDNESS—A contract by a municipal corporation to pay for an article in annual or monthly installments does not create an indebtedness, for the aggregate sum of all the installments, see MUNICIPAL CORPORATIONS 13; *City of Laporte v. Gamewell Fire Alarm Tel. Co.*, 466.

A contract of purchase by a municipal corporation at a time when such city was indebted beyond the constitutional limit of two per cent. and had no money in the treasury is void, although there were sufficient funds on hands to pay same at the time fixed for payment, see MUNICIPAL CORPORATIONS, 12; *Ib.*

Payable out of a particular fund not within the inhibition of Art. 13 of the Constitution limiting municipal indebtedness to two per cent. of the value of taxable property, see MUNICIPAL CORPORATIONS, 15; *Ib.*

For current expenses, cannot be made beyond the constitutional limit, see MUNICIPAL CORPORATIONS, 14; *Ib.*

NATURAL GAS—

Duty of Company to Furnish.—Breach of Contract with Consumer.—Tort.—A natural gas company that has received a franchise to lay its pipes in the streets of a town and supply gas to the citizens thereof, owes a duty to serve all persons who make proper application for such service, and comply with such reasonable rules as may be fixed, and make such reasonable compensation as may be required; and where a contract has been entered into between such company and a consumer, such contract being but a statement of the reasonable conditions under which the company was required to perform its duty, the failure on the part of the gas company to perform such contract is a tort.

Coy v. Indianapolis Gas Co., 655.

NEGLIGENCE—A railroad company is not negligent in passing over its lines cars different in construction from those owned and used by itself, see RAILROADS, 7; *Louisville, etc., R. W. Co. v. Bates, Admr., 564.*

The conclusion of, is not for the jury where a special verdict is returned, see PRACTICE, 10; *Board, etc., v. Bonebrake, 811.*

1. *Master and Servant.*—In an action based upon negligence it must be shown that the master was guilty of the negligence charged and that the servant was free from contributory negligence at the particular time of the alleged injury.

New York, etc., R. R. Co. v. Ostman, Admr., 452.

2. *Railroads.—Maintaining Cattle Chute in Close Proximity to Sidetrack.*—The correct standard by which the negligence of a railroad company is measured, in an action for an injury to one of its trainmen arising out of its alleged negligence in maintaining a cattle chute in too close proximity to its tracks, is whether same is dangerous to persons operating its trains, when they are exercising, under the particular circumstances, ordinary care. *Ib.*

3. *Instruction.—Question of Law.*—In an action for personal injuries resulting from alleged negligence of defendant, an instruction that it is for the jury to determine whether the acts of the defendant, if established, "under all the circumstances amounted to negligence," is not objectionable as authorizing the jury to decide a question of law, where the court by other instructions had defined what it takes to constitute negligence.

Conner v. Citizens' Street R. R. Co., 430.

4. *Street Railway.—Passenger.—Contributory Negligence.—Instruction.*—An instruction to the jury that a street car company, as a common carrier, is bound to the highest degree of care for the safety of passengers, and that such company is liable for injury to a passenger caused by the failure to exercise such care, provided such passenger was not guilty of contributory negligence, is not erroneous because it fails to add an unrequested charge that only ordinary care is required of the passenger. *Ib.*

5. *When a Question for the Jury and When for the Court.—Special Verdict.*—When, under the facts disclosed by a special verdict, the question is presented either as to the negligence of the defendant or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of such ultimate facts, the determination thereof is within the province of the jury,

and their finding will be accepted by the court as controlling; but where the facts found are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, the finding of such ultimate fact, whatever it may be, will be disregarded by the court.

Cleveland, etc., R. W. Co. v. Moneyhun, Gdn., 147.

6. *Gas Company.—Defective Pipes.—Explosion.*—A gas company which uses a cracked and defective elbow in connecting its conducting pipe with the plumbing of a dwelling house, which elbow the company is repeatedly called upon to repair so as to prevent the leaking of gas, and which it fails to repair by the removal of the elbow or effectually closing the crack known to exist, is liable for injuries sustained by reason of the explosion of the escaping gas, in the absence of contributory negligence on the part of the injured party.

Richmond Gas Co. v. Baker, 600.

7. *Gas Company.—Explosion.—Contributory Negligence.*—Where a gas company has been notified by the occupants of a dwelling house, of a defect in an elbow connecting the conducting pipe with the plumbing of the house, and sends its agent to repair the same, and such agent after professing to have made the necessary repairs informs the family occupying the house that all is safe, and assures them that the odor of gas is from a gas post on the street, a member of the family remaining in the house, who is injured by an explosion of the gas, is not thereby guilty of contributory negligence.

Ib.

8. *Defective Bridge.*—A person having no knowledge of a defect in a bridge is not guilty of negligence in passing over the same, though he may have no legitimate business requiring him to do so.

Board, etc., v. Bonebrake, 311.

9. *Injury Received by Driver on Race Track.—Proximate Cause.*—An association conducting a horse race is guilty of negligence in starting a race of ten horses on a track thirty-seven feet wide at a time when another horse which had entered the race was being driven on the track in an opposite direction and was at a point within sixty feet of such starting place, and such negligence was the proximate cause of a collision between the horses and vehicles in such race, and the injuries resulting therefrom received by one of the drivers thereof.

Fairmount, etc., Agricultural Assn. v. Downey, 503.

10. *Willfulness.*—To constitute a willful injury the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.

Fisher, Admr., v. Louisville, etc., R. W. Co., 558.

11. *Willful Killing.—Railroad.*—A finding against a railroad company for a willful killing of a section hand, who was standing on the track, is not warranted in the absence of evidence showing what the deceased was doing at the time, even though the track was clear and deceased could have been seen from the cab of the engine for half a mile, and no signals were given of the approach of the train.

Ib.

NEW TRIAL—To be available on appeal, an error in finding of trial court should be assigned as a reason for new trial, see **APPEAL AND ERROR**, 5; *Herrick, Admr., v. Flinn, Admr., 258.*

NICHOLSON LAW—See **INTOXICATING LIQUORS**, 1, 2, 3, 4, 5 and 6; *White et al. v. Prifogle et al., 64*; *Massey v. Dunlap et al., 350*; *Sutherland et al. v. McKinney, 611.*

NOTE—See PROMISSORY NOTE.

NOTICE—Of intention to hold mechanic's lien not invalid for failure to specify when the work was done or material furnished, see MECHANIC'S LIEN, 1 and 2; *Jeffersonville Water Supply Co. v. Riter*, 521.

1. *Special Session of Commissioners' Court.—Commencement of Term of New Member of Board After Notice.*—The board of county commissioners is not dissolved by one member going out and another coming in, and if the existing members of the board have proper notice of a meeting of the board to hear and determine contested election cases, called by the auditor as provided by statute, no further notice is required to be served on new members who become such before the meeting. *Tombaugh v. Grogg*, 99.
2. *Commissioners' Court.—Special Session.—Contested Election.*—Where the notice to the board of county commissioners to meet in special session to try a contested election case was not served, but the members appear at the time and place fixed to try the same, thus waiving service of notice, neither the contestor nor contestee can object to such want of service. *Ib.*
3. *Commissioners' Court.—Special Session.*—Where a notice to the members of the board of commissioners to meet in special session states their names incorrectly or names the wrong persons, and the legal members thereof attend, the special session will be lawful. *Ib.*
4. *Commissioners' Court.—Special Session.—Contested Elections.—Statute Construed.*—When notice has been issued to the board of commissioners, and the contestee, as required by section 4760, R. S. 1881 (6316, Burns' R. S. 1894), and the board of commissioners fail to meet in such special session, and no other special session is called before the next regular session of the board, such contested election case, as provided in said notice for a special session, may be tried at the regular session of such board. *Ib.*
5. The erection and maintenance for more than fifteen years of an outside stairway on the land of one person leading to a building on the land of another is sufficient notice of an agreement between the two for the construction of such stairway, to all persons claiming under the former. *Joseph et al. v. Wild*, 249.

NUISANCE—An ordinance declaring a partially burnt building to be a nuisance irrespective of its actual condition or location is invalid, see MUNICIPAL CORPORATIONS, 17, 18; *City of Evansville et al. v. Miller*, 613.

NUNC PRO TUNC—Commissioners' court may correct its records by *nunc pro tunc* entry, see COMMISSIONERS' COURT, 2; *Tombaugh v. Grogg*, 99.

ORDINANCES—Rules for the government of a city council, presented in writing and adopted at a regular meeting of such council are in effect an ordinance, and cannot be repealed on a mere verbal and general motion to that effect, see MUNICIPAL CORPORATIONS, 16; *Smith et al. v. Reister*, 527.

Where the power granted by the legislature to a city is general, an ordinance passed in pursuance thereof must be a reasonable exercise of the power granted, see MUNICIPAL CORPORATIONS, 4, 5, 6,

7; *City of Shelbyville v. Cleveland, etc., R. W. Co.*, 66; *Pittsburgh, etc., R. W. Co. v. Town of Crown Point*, 421.

1. *Repeal of Ordinance by Implication.—Lights at Street and Railroad Crossings.*—A municipal ordinance requiring railroad companies to maintain an electric light of a certain specified power at each point where the road crosses a public street, and imposing a fine of \$50.00 for each violation thereof is impliedly repealed by a subsequent ordinance requiring all railroad companies to provide for the safety of citizens and others by maintaining electric lights at such points as are therein specified, and imposing a penalty of not less than \$25.00, nor more than \$100.00 for every train run over such crossing where a light is not kept and maintained.

Terre Haute, etc., R. R. Co. v. South Bend, 239.

2. *Repeal of During Progress of Prosecution.*—Where, during the progress of a prosecution for the violation of a city ordinance such ordinance is repealed by implication, without reservation as to pending actions thereunder, the prosecution must fail. *Ib.*

PARTIES—The wife of a purchaser of lands sold under foreclosure of a mechanic's lien is not a necessary party in an action to foreclose a prior mortgage on such real estate, see JUDICIAL SALE, 1; *Vandevender et al. v. Moore et al.*, 44.

PARTITION—Objections to a judgment in partition of lands must be made by a motion to modify such judgment in the trial court, see PRACTICE, 8; *Vandevender et al. v. Moore*, 44.

1. *Title to the Real Estate Presumed not to be in Issue.*—In proceedings for the partition of real estate, title is presumed not to be in issue. *Green et al. v. Brown, Admr.*, 1.
2. *Decedent's Estates.—Lien.*—A decree in partition procured by the heirs, pending the settlement of a decedent's estate, does not preclude the administrator from asserting liens held by the estate against the realty partitioned, the administrator not being made a party to the proceedings. *Ib.*

PARTNERSHIP—

1. *Judgment.—Confession Of.*—A partner has no authority to confess judgment against his co-partners, and if judgment be entered upon such confession, it will be void as to them, but valid as to him. *Davenport Mills Co. v. Chambers*, 156.
2. Where partners are sued and one partner files an affidavit confessing judgment, signed by the firm name, but which purports to be and is his affidavit, the judgment is void as to the partnership. *Ib.*
3. *Insolvency.—Sale of Property by Partner.*—In the absence of fraud or a showing that injury would result to the partnership, an insolvent partner of an insolvent partnership may sell personal property belonging to such partnership to a person who is known to be insolvent. *O'Toole et al., v. Howery*, 685.

PAYMENT—An execution creditor may make a valid purchase of property without paying the amount of the principal debt by receipting the sheriff for such amount, see JUDICIAL SALE, 2; *Boots v. Ristine*, 75.

Bank Check.—A check may be given and received, by agreement of the parties, as payment of a debt, and the debt for which it is so given is thereby extinguished, and if the check is not paid the right

of action is on the check and not on the obligation or indebtedness for which it was given. *Sutton v. Baldwin*, 361.

PERSONAL INJURIES—In the assessment of damages, in an action for personal injuries, the shortening of life is not taken into consideration, see DAMAGES, 1; *Richmond Gas Co. v. Baker*, 600.

PLEADING—Sufficiency of, in an action to set aside a judgment for want of notice to the parties, see JUDGMENT, 5; *Bailey et al. v. Rinker et al.*, 129.

1. *Complaint.—Necessary Allegations in Action for Negligence.*—A complaint for negligence to be sufficient, must allege the negligence of the defendant and the freedom of the plaintiff from negligence. *Baltimore, etc., R. W. Co. v. Young*, 374.
2. *Proximate Cause.—Complaint.—Sufficiency Of.*—To constitute a good complaint in an action for negligence, it must affirmatively appear from the facts pleaded that the negligence of the defendant was the proximate cause of the injury. *Ib.*
3. *Negligence.—Complaint.*—A general allegation of negligence in a complaint is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the facts pleaded. *Louisville, etc., R. W. Co. v. Bates, Admr.*, 564.
4. *Negligence.—Complaint.—Motion to Make More Specific.*—The defendant may by a motion to make more specific require plaintiff, in an action for personal injuries, to state the specific acts or omissions of the defendant which constitute the negligence relied upon. *Ib.*
5. *Master and Servant.—Negligence of Master.—Sufficiency of Complaint.*—A complaint states the facts essential to a master's liability for injuries to his servant sufficiently to withstand a demurrer, where it alleges that the plaintiff was employed as sawyer in defendant's mill; that when he had been at work there but three days it became necessary in the course of his employment to pass from one part of the mill to another; that near the passageway along which plaintiff was compelled to go was a rapidly revolving shaft, in which was a set-screw projecting a distance of three inches, which defendant had negligently left unguarded; that in passing the revolving shaft the projecting set-screw caught and so injured plaintiff's foot that it had to be amputated; that defendant well knew the defective and dangerous condition of shaft and set-screw, but did not inform the plaintiff of the danger, and that the plaintiff was without fault, having no knowledge of the danger. *Potter v. Knox County Lumber Co.*, 114.
6. *Fraud.—Necessary Allegations of Fraud.*—The use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. *Guy et al. v. Blue et al.*, 629.
7. *Fraud.—Action to Set Aside Deed.*—In an action to set aside a deed alleged to have been procured by fraud it must appear from the averments of the complaint that there was an intention to deceive and that in reliance upon the facts, with the use of ordinary care, they were acted upon in good faith and the deception accomplished to the prejudice of the other party. *Ib.*
8. *Complaint by One County Against Another to Recover Proportionate Costs of Constructing Bridge on Boundary Line.*—A complaint by one county against another to recover its proportionate share of the cost of constructing a bridge upon the bound-

ary line must show a compliance with section 2880 R. S. 1881 (3251, Burns' R. S. 1894) requiring the concurrence of the boards of commissioners of the two counties on the question of public convenience of the bridge, and that both boards considered a survey, or plans and specifications with a view to the exercise of their judgment upon the character of the bridge.

Board, etc., v. Board, etc., 138.

9. *Amended Complaint*.—A complaint to rescind a contract for the dissolution of a partnership on account of fraud, and for the appointment of a receiver, may be amended so as to become a complaint for damages for fraud alleged to have been perpetrated by defendant.

Cohoon v. Fisher, 583.

10. *Argumentative Denial*.—An argumentative denial, if otherwise good, is sufficient to withstand a demurrer.

Smith v. McClain et al., 77.

11. *Action on Note and Mortgage*.—*Sufficiency of Answer*.—In an action on a note and to foreclose the mortgage security, an answer alleging that defendant has fully paid "all the notes and items charged and mentioned in the complaint" is sufficient to cover the obligations of both the note and the mortgage.

Manley v. Felty, 194.

12. *Municipal Corporation*.—*Condemnation of Land for Street Purposes*.—*Answer*.—*Statute Construed*.—Under section 8643 Burns' R. S. 1894 (R. S. 1881, 8180), providing for appeals from proceedings for the condemnation by cities of lands for street purposes, an answer by appellant objecting to the amount of damages assessed as being too small, and demanding an increased amount of damages will be sufficient as against a demurrer.

City of Decatur v. Grand Rapids, etc., R. R. Co. et al., 577.

13. *Assault and Battery*.—*Answer in Justification of Assault*.—An answer to a complaint for an assault and battery in justification thereof which does not allege any fact necessarily implying that the occurrence alleged in the complaint, and that set up and justified in the answer, were one and the same, is bad.

Pyle v. Peyton, 90.

14. *Practice*.—Facts alleged in one paragraph of a pleading cannot be called to the support of another paragraph.

Ib.

15. *Answer Out of Record When not Brought into a Subsequent Pleading by Mere Reference Thereto*.—An original answer which has been taken out of the record, by the court sustaining a demurrer thereto, cannot be brought into an answer to a supplemental complaint by merely referring thereto and adopting the same as a part thereof.

Western Union Tel. Co. v. State, 54.

16. *Infant*.—*Plea in Bar*.—*Plea in Abatement*.—*Decree*.—Where, in a suit to foreclose a mortgage the defendant sets up the fact of his infancy at the time the note and mortgage was executed, such answer, by whatever name it may have been inadvertently called, is a plea in bar and not in abatement, and the addition to the decree for the defendant of the words: "and that the same do abate" is but surplusage and may be disregarded.

Winer et al. v. Mast, 177.

17. *Plea in Abatement*.—*Sufficiency Of*.—An answer in abatement is not required to state facts sufficient to constitute a defense to an action, it is sufficient if it states facts sufficient to abate the action.

Combs v. Union Trust Co., Tr., 688.

POOR PERSON—If the right to prosecute an action as a poor person, under Section 260 R. S., 1881 (261 Burns' R. S., 1894), can be extended by construction to proceedings to contest a will, the contestant would not by reason thereof be relieved from giving bond, see **WILLS**, 14; *Harrison v. Stanton et al.*, 366.

PRACTICE—When equity will determine the character of a proceeding, see **ACTION**, 2; *Field v. Brown et al.*, 293.

Facts alleged in one paragraph of a pleading cannot be called in support of another paragraph, see **PLEADING**, 14; *Pyle v. Peyton*, 90.

A proceeding to substitute a will which has not been probated for another which has been probated involves the contest of the latter, and must be commenced within three years after such latter will has been offered for probate, see **WILLS**, 13; *Bartlett et al., v. Manor et al.*, 621.

An answer to which a demurrer has been sustained cannot be brought into an answer to a supplemental complaint by merely referring thereto and adopting the same as a part thereof, see **PLEADING**, 15; *Western Union Tel. Co. v. State*, 54.

A will may be set aside and a lost or destroyed will established in one proceeding, see **WILLS**, 12; *Bartlett et al., v. Manor et al.*, 621.

The insufficiency of the complaint cannot be urged on an appeal from an interlocutory order appointing a receiver, see **RECEIVERS**, 3; *Gray et ux., v. Oughton*, 285.

1. *Special Appearance.—When Amounts to General Appearance.*—When a motion is filed under a special appearance, to strike out a cross-complaint for want of process against the plaintiff, and for other reasons which are such as must be taken advantage of by demurrer or answer, the filing of such motion constitutes a full appearance equivalent to the service of process.

McCoy et al., v. Stockman et al., 668.

2. *Motion to Strike Out Cross-Complaint for Want of Sufficient Facts.*—It is error to strike out a cross-complaint on the ground that it does not state facts sufficient to constitute a cause of action. *Ib.*

3. *Motion to Strike Out Cross-Complaint on the Ground that Complainants are not All Parties to the Action.*—Where a motion is made to strike out a cross-complaint in which several defendants join, on the ground that some of them are not properly parties to the action, it is not error to refuse to strike out such a motion when such objection does not apply to all the parties. *Ib.*

4. *Correction of Ruling in the Formation of Issues.*—Where a ruling upon the formation of the issues is wrong it may be corrected by the court, but it must be done at such time and in such manner as not to prejudice the rights of the pleader.

Field v. Brown et al., 293; *Gingrich et al., v. Gingrich*, 227.

5. *Informal Demurrer.*—A judgment will not be reversed on appeal on account of the informality of a demurrer which was sustained to an insufficient answer to which it was addressed. *Ib.*

6. *Admission of Evidence Under General Denial.*—The defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint, but may introduce proof

of facts, independent of those alleged in the complaint and inconsistent therewith. *Jeffersonville Water Supply Co. v. Riter*, 521.

7. *City Ordinance*.—Overruling a demurrer to an answer setting up the invalidity of an ordinance is in effect holding the ordinance invalid. *City of Shelbyville v. Cleveland, etc., R W. Co.*, 66.
8. *Partition*.—Objections to a judgment in partition of lands setting off the portion of one party without any adjudication as to the rights of the other parties must be made by motion to modify such judgment in the trial court. *Vandevender v. Moore, et al.*, 44.
9. *Waiver*.—When a demurrer to the answer is sustained and an amended answer is filed, error is waived as to sustaining of demurrer. *Davenport Mills Co. v. Chambers*, 156.
10. *Conclusion of Negligence*.—*Special Verdict*.—The conclusion of negligence is not for the jury where a special verdict is returned. *Board, etc., v. Bonebrake*, 311.
11. *Special Verdict*.—*Improper Findings*.—Improper findings in a special verdict do not defeat the verdict but should be disregarded. *Ib.*
12. *Interrogatories to Jury, When May Be Rejected by Court*.—It is not error for the court to reject interrogatories propounded to the jury, where there are other interrogatories covering the same facts. *Ib.*

PRESUMPTION—All reasonable presumptions and intendments must be made to sustain a general verdict, see **APPEAL AND ERROR**, 19; *Central Union Telephone Co. v. Fehring*, 189.

That pleadings have been amended to conform with proofs, see **APPEAL AND ERROR**, 20; *City of Decatur v. Grand Rapids, etc., R. R. Co. et al.*, 577.

PROMISSORY NOTE—

Payment.—Defendant executed, as surety, a promissory note payable to a certain bank pursuant to an agreement, that in the event defendant assigned to the bank a certain judgment owned by him he should be relieved of all liability on the note. On the death of the maker of the note it was filed and proven as a claim against his estate and defendant in accordance with his agreement assigned the judgment held by him to the bank. A receiver thereafter appointed for the bank sold all accounts, notes and choses in action of the bank. *Held*, that the note had wholly ceased to be an asset of the bank before the appointment of a receiver.

First National Bank v. New, 411.

PROSECUTING ATTORNEY—

1. *Not Liable for Maliciously Procuring Indictment*.—A prosecuting attorney is not liable in an action for malicious prosecution for participation by him in procuring an indictment maliciously and without probable cause. *Griffith v. Slinkard*, 117.
2. *Reading in Open Court a False Indictment*.—*Not Defamation*.—The reading by the prosecuting attorney, in open court to the officers thereof and in the hearing of others, of an indictment, even though it be false and improperly procured, is privileged and cannot be the foundation of an action for defamation. *Ib.*

PROXIMATE CAUSE—In an action for negligence it must affirmatively appear from the facts pleaded that the negligence of the

defendant was the proximate cause of the injury, see PLEADING, 2; *Baltimore, etc., R. W. Co. v. Young*, 374.

Starting a race of ten horses on a race track when a horse which had been entered in such race was being driven in an opposite direction at a point within 60 feet of such starting point was the proximate cause of a collision and the injuries resulting therefrom, see NEGLIGENCE, 9; *Fairmount, etc., Agricultural Ass'n v. Downey*, 503.

PUBLIC LANDS—

Description Of.—The boundaries of lots patented by the United States as numbered lots of their respective sections, cannot extend beyond the boundaries of the sections themselves.

Tolleston Club v. Clough, 93.

QUIETING TITLE—

1. *Sufficiency of Complaint.*—Where, in an action to quiet title to certain land consisting of several parcels, the allegation in the complaint, "That the defendant claims some interest therein adverse to the plaintiff's, which claim is without right and unfounded, and a cloud upon plaintiff's title," sufficiently charges adverse and unfounded claim by defendant. *Ib.*

2. *Lands Exempt from Sale on Execution.*—*When Action Must be Commenced.*—A purchaser of real estate which the vendor could have claimed as exempt from sale on execution, may maintain an action to quiet the title to such real estate if the same is commenced before the sheriff's sale. *Moss et al. v. Jenkins et al.*, 589.

QUIT-CLAIM DEED—Grantee may become a *bona fide* purchaser same as under any other form of conveyance, see DEED, 6 and 7; *Smith v. McClain, et al.*, 77.

RAILROADS—A railroad company cannot by contract with passenger protect itself from liability resulting from its negligence, see CARRIERS, 1; *Louisville, etc., R. W. Co. v. Keefer*, 21.

A town cannot by ordinance compel a railroad company to maintain a watchman at street and railroad crossing, see MUNICIPAL CORPORATION, 8; *Pittsburgh, etc., R. W. Co. v. Town of Crown Point*, 421.

A railroad company carrying goods for an express company under special contract is a private and not a common carrier, see CARRIERS, 2. *Louisville, etc., R. W. Co. v. Keefer*, 21.

As to power of city to require railroad companies to maintain lights at street and railroad crossings, see MUNICIPAL CORPORATIONS, 1, 2, 3, 4; *City of Shelbyville v. Cleveland, etc., R. W. Co.*, 66.

1. *Duty as to Notice of Whereabouts of Work or Wild Trains.*—A railroad company operating a single track road, owes no duty to its employes upon its regular trains to adopt a rule requiring notice to be given to such employes of the whereabouts of work or wild trains, in addition to a rule printed with time table of all regular trains, requiring the conductors and enginemen of all work or wild trains to keep their trains out of the way of all regular trains, and in no case to occupy the main track of the road within ten minutes of the time of any regular train.

Terre Haute, etc., R. R. Co. v. Becker, Admr., 202.

2. *Presumption that Employes Will Discharge Their Duty.*—A rail-

road company has a right to presume that its servants in charge of a work train will discharge their duty as provided by a rule requiring them to keep out of the way of all regular trains, and is exempt from liability for injuries resulting from a violation of the rule by an employe when the injury is the direct or proximate cause of such violation. *Ib.*

3. *Must Furnish Reasonably Safe Cars and Other Appliances.—Inspection.*—It is the duty of a railroad company to exercise ordinary care in furnishing reasonably safe cars and other appliances, and also to exercise ordinary care, by inspection and repair, to keep them in reasonably safe condition, so as not to unreasonably expose its employes to unknown and extraordinary hazards.
Louisville, etc., R. W. Co. v. Bates, Admr., 564.
4. *Not Required to Furnish Cars and Appliances that are Absolutely Safe.*—A railroad company is not required to furnish cars or appliances that are absolutely safe, or to maintain them in that condition. The company is not an insurer of the safety of the employes against injury. *Ib.*
5. *Impracticable or Unreasonable Tests of Cars and Appliances Not Required.*—A railroad company is not required to resort to tests of cars and other appliances that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of its business. *Ib.*
6. *Duty as to Inspection of Foreign Cars.*—The duty of a railroad company as to foreign cars received in regular course of business for transportation over its lines is that of exercising ordinary care in inspecting the same to see if they are in reasonably safe condition of repair, and if found to be out of repair, to put them in a reasonably safe condition of repair, or notify its employes of the condition of such cars. A greater degree of care would be required if such cars were old or obviously defective. *Ib.*
7. *Receiving Cars of Different Construction.—Negligence.*—A railroad company is not negligent in receiving and passing over its lines cars different in construction from those owned and used by itself, if the same are not out of repair, or in such a defective condition as can be discovered by ordinary care. *Ib.*
8. *Inspection of Foreign Car.—Special Verdict.*—In an action against a railroad company for the death of a brakeman caused by an unknown defect in the couplings of a foreign car, a special verdict found that the couplings were apparently in proper position and in good repair, that the defects were not observable, and that deceased had no notice or reason to think said couplings were in any way out of repair. It was further found that the railroad company maintained a resident car inspector whose duty it was to inspect all cars before placing them in trains of said company at said station; that said inspector made a hurried and superficial test without tools, such test not occupying to exceed five minutes, by which inspection the defects were not discovered; that to have made an efficient and proper inspection and examination would have required fifteen minutes; and with no other inspection said car was ordered into said train. That the defective condition of said couplings could easily have been discovered by a reasonable and ordinary inspection thereof by said inspector if competent to make the same, and that the evidence did not show said inspector to have been competent. *Held*, that the facts found failed to show that the inspection was not made in the usual and ordinary manner and was not such as the requirements and exigencies of commerce will permit. *Ib.*

9. *Presumption as to Car Inspector's Competency.*—A railroad company is not required to prove that its car inspector was "sufficiently skilled and competent" to act at a particular place. Competency will be presumed until the contrary is shown. *Ib.*
10. *Duty of Passenger.*—It is the duty of one about to take passage on cars to ascertain for himself whether the rules of the carrier will permit a stop at a particular point where he may desire to get off. *Conner v. Citizens' Street R. R. Co., 430.*
11. *Rules for Protection of Employes.*—It is the duty of a railroad company to adopt and enforce suitable rules or regulation for the protection of employes and the company is not liable for injuries resulting from the violation thereof. *Terre Haute, etc., R. R. Co. v. Becker, Admx., 202.*

RAILROAD CROSSING—

Failure to Give Signals at Crossing.—Collision.—Proximate Cause.—Sufficiency of Complaint.—A complaint, for personal injuries received at a railroad crossing by reason of the failure of defendant to give signals, which fails to allege that plaintiff could have heard the signals if given, or that if he had heard them before going upon the track he could have avoided the collision, is bad for its failure to allege that the injury was due to the omission of defendant to give signals. *Baltimore, etc., R. W. Co. v. Young, 374.*

RAPE—As to sufficiency of affidavit and information, see **CRIMINAL LAW**, 5; *State v. Duggins, 487.*

REAL ESTATE—Sale of by guardian, see **GUARDIAN AND WARD**, 1, 2; *Decker v. Fessler, 16.*

Description in Deed of Conveyance.—In a description of real estate as "The S. half (or lots 1, 2, 3 and 4), Sec. 20," the particular reference to lots control the general description. *Tolleston Club v. Clough, 93.*

RECEIVERS—

1. *Sufficiency of Petition.—Mortgage.*—A petition, subsequent to a personal judgment and decree of foreclosure of a mortgage, for the appointment of a receiver of the rents and profits of the real estate is sufficient, where such petition discloses that the property is inadequate to secure the debt, that the debtor is insolvent, that the mortgagors do not occupy the property, and that the security is in peril from the lapse of insurance and the maturity of taxes. *Harris et ux. v. United States Savings, etc., Co., 265.*
2. *Mortgage.—Debtor's Right of Exemption.*—Where a decree for the foreclosure of a mortgage has been procured, the right of the debtor to exemption of the rentals of the mortgaged property is no objection to the appointment of a receiver of rents upon a showing that the debtor is insolvent and the security inadequate, where the order directs the receiver to apply the rentals to insurance and taxes, and to retain the balance subject to the future order of the court. *Ib.*
3. *Interlocutory Order.—Sufficiency of Complaint.*—On an appeal from an interlocutory order appointing a receiver, the insufficiency of the complaint cannot be urged, as the complaint in all respects is still pending in the trial court subject to amendment. *Gray et ux. v. Oughton, 285.*
4. *Appointment Of.*—Where a receiver is appointed in open court in the presence of the parties in interest without objection or excep-

tion, the legality of such appointment cannot afterwards be raised by a motion to set it aside, nor by a motion for a new trial. *Ib.*

RECORD—A bill of exceptions containing the evidence signed by the judge and entered in order-book in term time is part of, see **APPEAL AND ERROR**, 9; *Barber et al. v. Barber et al.*, 390.

Bill of Exceptions.—Interlocutory Order.—In an appeal from an interlocutory order overruling a motion to dissolve an injunction, the complaint, answers, and interlocutory order belong to the record proper without a bill of exceptions.

Home Electric Light, etc., Co. v. Globe Tissue Paper Co., 673.

REDEMPTION—Where a mortgagee obtains title to real estate through foreclosure of a mortgage executed by the husband and afterward redeems from a sheriff's sale under a foreclosure of a senior mortgage on same real estate, executed by husband and wife, the redemptioner thereby obtains a lien on the wife's interest in said real estate, and upon the failure of such wife to redeem within the year of redemption all interest in such real estate is lost to her forever, see **MORTGAGE**, 3; *Breedlove et al. v. Austin*, 694.

REFORMATION OF INSTRUMENTS—When demand is necessary, see **EQUITY**, 4; *Citizens' National Bank of Attica v. Judy et al.*, 322.

When equity will reform a mortgage, see **EQUITY**, 1, 5, 6, 8; *Ib.*

REMONSTRANCE—Against the granting of a license to sell intoxicating liquor must apply to a particular applicant, see **INTOXICATING LIQUOR**, 3; *Massey v. Dunlap et al.*, 350.

Only legal voters of township or ward entitled to remonstrate against the granting of a license to sell liquor, see **INTOXICATING LIQUOR**, 2; *Ib.*

When remonstrant may not withdraw his name from remonstrance, see **INTOXICATING LIQUOR**, 1, 6; *White v. Prifogle et al.*, 64.

REPUTATION—Cannot be shown by proof of particular acts, see **EVIDENCE**, 3, 4; *Stalcup v. State*, 270.

REVOCATION—Dedication of lands to the public may be revoked prior to the acceptance, see **DEDICATION**, 2, 3; *Steinauer v. City of Tell City et al.*, 490.

SCHOOLS—

1. *Relocation of School Building.—Power of Township Trustee.—Statute Construed.*—Sections 5920, a, b and c, Burns' R. S. 1894, providing that the change of site and removal of school building must be done by petition to county superintendent signed by township trustee and a majority of the patrons of the school where the building is located, takes away the discretion hitherto exercised by township trustees under section 4444, R. S. 1881, in the matter of the removal and relocation of the site of a public school building. *Kessler, Tr., v. State et al.*, 221.

2. *Moving School Building.—Erection of New Building on New Site.—Statute Construed.*—Sections 5920, a, b and c, Burns' R. S. 1894, must be construed as applicable alike to cases where it is de-

sired to build a new schoolhouse in a new location, as it is to the mere removal of a schoolhouse to a new location. *Ib.*

SEWERS—A city council has power under sections 4288-4299 Burns' R. S. 1894 to make a contract for a general sewer, see **MUNICIPAL CORPORATIONS**, 10; *Alley v. City of Lebanon et al.*, 125.

The common council may make assessments against property-owners for sewer improvements without submitting same to the city commissioners, see **MUNICIPAL CORPORATIONS**, 11; *Ib.*

SLANDER—

Plea in Justification.—Requisites Of.—In a civil action for slander the plea or answer of justification must affirmatively show that the plaintiff is guilty of the offenses imputed by the words set out in the complaint, and that they were true in the sense in which they were averred to have been spoken by the defendant. A mere reiteration of the slanderous words, with an averment that they are true, is not sufficient.

Campbell v. Irwin, 681.

SPECIAL APPEARANCE—The filing of a motion under a special appearance to strike out a cross-complaint for want of process against the plaintiff, and for other reasons which are such as must be taken advantage of by demurrer or answer, constitutes a general appearance, see **PRACTICE**, 1; *McCoy et al. v. Stockman et al.*, 668.

SPECIAL FINDING—Not necessary that there be a finding as to all allegations of complaint, see **EVIDENCE**, 6; *Fairmount, etc., Agricultural Assn. v. Downey*, 503.

Omissions therefrom of any fact essential to support the judgment below, see **APPEAL AND ERROR**, 18; *Cleveland, etc., R. W. Co., v. Moneyhun, Gdn.*, 147.

1. *Nothing Added by Inference.*—Nothing can be added to a special finding of facts by inference or intendment.

Craig v. Bennett, 574.

2. *Law and Fact.—Cannot Aid Each Other.*—The statement of a fact or facts in the conclusion of law cannot make the special finding good which fails to find such fact or facts. *Ib.*

3. *When may be Disregarded.*—Special findings that are of the nature of legal conclusions can serve no purpose in a special verdict and may be disregarded.

Terre Haute, etc., R. R. Co. v. Becker, Admx., 202.

4. *When Outside of Issues.*—To the extent that a special finding is outside of the issues in a cause, it is a nullity and can give no support to a conclusion of law thereon.

Citizens' National Bank of Attica v. Judy et al., 322.

5. *Verdict.—Statute Construed.*—Under section 555, Burns' R. S. 1894 (546 R. S. 1881), providing for a special verdict, as amended by the Act of March 11, 1895 (Acts of 1895, p. 248), when there is a demand for such a verdict upon "all the issues of the cause," a general verdict is not contemplated, but leaves the court to pronounce judgment upon the special verdict.

Bower et al., v. Bower et al., 393.

SPECIAL JUDGE—As to the appointment of, see **COURTS**, 2; *Harris et ux. v. U. S. Savings Fund, etc., Co.*, 265.

SPECIAL VERDICT—The conclusion of negligence is not for the jury where a special verdict is returned, see PRACTICE, 10; *Board, etc., Co. v. Bonebrake*, 311.

Improper findings in a special verdict do not defeat the verdict but should be disregarded, see PRACTICE, 11; *Ib.*

Where the facts found in a special verdict are such that this court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, the finding of such ultimate fact may be disregarded by the court, see NEGLIGENCE, 5; *Cleveland, etc., R. W. Co. v. Moneyhun Gdn.*, 147.

1. *Failure to Find as to Material Fact in Issue.—Presumption.*—When any fact material to the issue is not set forth in a special verdict, the presumption is that there was not evidence sufficient to establish such fact, and the same is treated as found against the party having the burden of proof as to such fact.

Fisher, Admr., v. Louisville, etc., R. W. Co., 558.

2. *When it Includes Matters Outside the Issues.*—If the special verdict of the jury includes findings of evidentiary facts, conclusions of law, and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found.

Louisville, etc., R. W. Co. v. Bates, Admr., 564.

3. *Venire de Novo.*—A special verdict is not subject to a motion for a *venire de novo* when it finds facts sufficient to enable the court to pronounce judgment thereon, although the jury fails to find upon all the issues.

Bower et al. v. Bower et al., 393.

STATUTORY CONSTRUCTION—As to what is meant by “candidates for highest office at last election” as used in section 9 of “Nicholson liquor law,” see INTOXICATING LIQUORS, 5; *Massey v. Dunlap et al.*, 350.

How the majority of voters as is required to sign a remonstrance against the granting of a license to sell intoxicating liquors is determined, see INTOXICATING LIQUORS, 8; *Ib.*

Legal voters only entitled to join in a remonstrance against the granting of license to sell liquor, see INTOXICATING LIQUORS, 2; *Ib.*

As to foreign building and loan associations doing business in this State, see BUILDING AND LOAN ASSOCIATIONS; *Maine Guarantee Co. v. Cox et al.*, 107.

Action by guardian for injury to ward, see GUARDIAN AND WARD, 4; *Cleveland, etc., R. W. Co. v. Moneyhun, Gdn.*, 147.

Habitual drunkard, under guardianship not under legal disability, see GUARDIAN AND WARD, 4; *Makepeace v. Bronnenberg et al.*, 243.

As to appointment of guardian for minor female whose husband is also a minor, see GUARDIAN AND WARD, 3; *Decker v. Fessler*, 16.

As to guardian’s sale of real estate, see GUARDIAN AND WARD, 1, 2; *Ib.*

Infant may bring suit to set aside a default and judgment against him before he attains his majority, see INFANT; *Winer et al. v. Mast et al.*, 177.

- As to the right of an adopted child to inherit from the childless subsequent wife of the adopting father, see DESCENT AND DISTRIBUTION, 1, 2; *Patterson et al. v. Browning*, 160.
- As to conveyance of real estate by childless second wife; see HUSBAND AND WIFE, 1; *Forgy v. Davenport*, 399.
- As to petition for free gravel road, see FREE GRAVEL ROADS, 5; *Miller et al. v. Burks et al.*, 219.
- As to constructing bridge on county line, see PLEADING, 8; *Board, etc., v. Board, etc.*, 138.
- As to the relocation of schoolhouses, see SCHOOLS, 1, 2; *Kessler, Tr., v. State, ex rel.*, 221.
- Extension of trial in commissioners' court beyond the regular term, see COMMISSIONERS' COURT, 1; *Tombaugh v. Grogg*, 99.
- As to exemption of householder, see EXEMPTIONS, 1; *Moss et al. v. Jenkins et al.*, 589.
- As to quit-claim deed, see DEED, 6; *Smith v. McClain*, 77.
- Section 5173, Burns' R. S. 1894, authorizing cities to provide by ordinance for the security and safety of citizens from the running of trains through cities does not authorize the passage of an ordinance requiring railroad companies to maintain a light at every street crossing, see MUNICIPAL CORPORATIONS, 3; *City of Shelbyville v. Cleveland, etc., R. W. Co.*, 66.
- The act of April 8th, 1885 (sections 5511, 5512 and 6529, Burns' R. S. 1894), prescribing the duties of telegraph and telephone companies is not unconstitutional as embracing two subjects, see TELEGRAPH AND TELEPHONE COMPANIES, 1; *Cent. Union Tel. Co. v. Fehring*, 189.
- As to the special verdict law of March 11, 1895, see SPECIAL FINDING, 5; *Bower et al. v. Bower et al.*, 393.
1. *When Grammatical Construction Disregarded.*—Where the legislative sense of a statute is plain, the exact grammatical construction and propriety of language may be disregarded.
State v. Myers, 36.
 2. *Intoxicating Liquors.—Grammatical Construction.*—The word "and" in section 10 of the Act of March 11, 1895, which section declares that its provisions shall apply to persons, places, and sales of spirituous, vinous, malt "and" other intoxicating liquors, will be construed as "or," it being necessary to so construe the word "and" to harmonize said section 10 with the other sections of the statute.
Ib.
 3. *Construction of Deeds.—Descent.*—If the Act of March 11, 1889 (Acts 1889, p. 480, section 1; Burns' R. S. 1894, 2644) is unconstitutional because it attempts to amend a statute already repealed, the remaining sections, 2645-2647, Burns' R. S. 1894, will not be held to be unconstitutional because they are so complete in themselves as to stand alone, and the subject of the same would be sufficiently expressed in the title to comply with the requirements of the constitution.
Smith v. McClain et al., 77.
 4. *Construction Of.—Subject-matter of Act.*—The requirement of the Constitution, Article 4, section 19, that "every act shall embrace but one subject and matters properly connected therewith" is not violated by Act, March 11, 1889 (Acts 1889, p. 480).
Ib.

5. *Descent.—Deed.—Conveyance by Heirs to Childless Second Wife.—Estoppel.*—Under Act March 11, 1889 (Acts of 1889, p. 480, sections 2 and 3; Burns' R. S. 1894, 2645, 2646) where, during the life of the childless second or subsequent wife of an intestate, his children convey in fee lands affected by her life-estate, and receive full payment therefor; they are estopped from claiming any title thereto; and under said sections, it was competent to prove whether there was any contract for the conveyance of the "fee" of the one-third part of the real estate which the widow inherited, and the consideration to be paid therefor, and whether full payment had been made. *Ib.*
6. *Construction of in Contested Election Cases.*—Statutes providing for contesting elections should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. *Tombaugh v. Grogg, 99.*
7. *Construction Of.—Validity of Statutes.*—The validity of an act of the general assembly will not be passed upon where the merits of the litigation may be passed upon without so doing. *Board, etc., v. Board, etc., 138.*
8. *Construction Of.—Joint County Bridges.*—Section 1, Acts of 1893 (Acts 1893, p. 46; 3253, Burns' R. S. 1894) providing for the construction and repair of bridges across a stream forming the boundary line between counties, is amendatory to section 2882, R. S. 1881, and raises a conflict as to the law intended to be amended, but the provisions of the amendment by express reference to the section amended is made to depend upon same, and the provisions of the original section must be complied with before the provisions of the amendatory section can be enforced. *Ib.*
9. Where there is nothing in an act to indicate that a word or phrase is used in a particular or technical sense it will be interpreted in accordance with its ordinary and popular meaning at the time of the passage of the statute. *Massey v. Dunlap et al., 350.*
10. *Clause Taken From Statute of Other State.*—Where a clause is taken from the constitution or statute of another state it will be deemed to have the meaning given it by the courts of that state. *City of Laporte v. Gamewell Fire Alarm Tel. Co., 466.*

STREET RAILWAYS—

1. *Negligence of Driver.—Willful Injury.*—Evidence that the driver of a street car slowed up the car at the signal of the plaintiff who was on the car with a friend; that the friend safely alighted while the car was in motion; that while plaintiff was on the platform waiting for the car to stop before getting off, the driver struck the mules with a whip, giving the car a sudden jerk, throwing plaintiff off, is not sufficient to support a charge of willful injury in the absence of proof that the driver knew at the time of striking the mules and starting the car that plaintiff had not alighted from the car. *Conner v. Citizens' Street R. R. Co., 430.*
2. *Willful Injury of Passenger.*—To entitle one to recover for an injury without showing his own freedom from contributory negligence, the injurious act or omission must have been purposely and intentionally committed, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation. *Ib.*

SUBROGATION—The lien by subrogation which equity affords to

the redemptioner must be confined to the property affected by the original lien from which redemption is made. *Green, et al. v. Brown, Admr., 1.*

SUPREME COURT—A decision of, constitutes the law of the case, so far as the principle involved is applicable, throughout all the stages of the cause thereafter, see **LAW OF CASE**; *Board, etc., v. Bonebrake, 311.*

Its Decisions Binding on All Courts of the State.—A decision of the Supreme Court is not only binding on all the inferior courts in the State, but it is binding on the Supreme Court until the decision is overruled. *Cohoon v. Fisher, 583.*

SURVEYOR—See **COUNTY SURVEYOR**.

TAXATION—The Act of March 6th, 1893 (8488 Burns R. S., 1894), providing for the collecting of taxes assessed against telegraph companies in the name of the state by the Attorney General is constitutional, see **TELEGRAPH AND TELEPHONE COMPANIES, 3**; *W. U. Tel. Co. v. State, 54.*

TAX TITLE—The holder of a tax deed may recover for taxes paid and improvements made upon the land when he is adjudged not to be the rightful owner thereof, see **LIMITATION OF ACTION**; **EJECTMENT, 1**; *Fish v. Blasser et ux., 186.*

TELEGRAPH AND TELEPHONE COMPANIES—

1. *Common Carrier.—Constitutional Law.*—The act of April 8, 1885 (sections 5511, 5512 and 5529, Burns' R. S. 1894) prescribing the duties of telegraph and telephone companies and providing penalties for its violation, is not unconstitutional as embracing the two subjects, telegraph and telephone companies, as its subject is that of regulating a certain class of common carriers.

Central Union Telephone Co. v. Fehring, 189.

2. *Telegraph Companies.—Collection of Taxes by Suit in Name of State.—Injunction.*—An injunction restraining county auditors and county treasurers from collecting taxes assessed against a telegraph company, does not prevent an action to recover the same in the name of the State, under section 8488 Burns' R. S. 1894.

Western Union Tel. Co. v. State, 54.

3. *Taxation.—Penalty.—Constitutional Law.*—Section 11, Act of March 6, 1893 (8488, Burns' R. S. 1894), providing that if a telegraph company refuse to pay the taxes assessed against it, an action for the collection thereof may be maintained in the name of the State by the Attorney-General, and the judgment shall include a penalty of fifty per cent. of the amount of the taxes is constitutional. *Ib.*

4. *Telephone Companies.—Discrimination Between Patrons.—Statute Construed.*—Refusal of a telephone company to connect the instrument of a subscriber with that of another patron renders it liable to the penalty imposed by the Act of April 8, 1885, requiring every telephone company to supply all applicants with telephone connections and facilities without discrimination or partiality, as the duty, under the statute, does not cease upon furnishing the instrument and connecting it with the exchange.

Central Union Telephone Co. v. Fehring, 189.

TELEPHONE COMPANIES—See **TELEGRAPH AND TELEPHONE COMPANIES**.

TENDER—

Money Deposited with Clerk of Court.—Where, pending a trial, defendant deposits certain money in court to be returned to him on condition plaintiff surrenders to the clerk of the court defendant's check issued in payment of the debt in suit, the money and check to be held by the clerk subject to the order of the court, and such check is not surrendered, an order of court to return the money deposited is proper. *Sutton v. Baldwin*, 361.

TORT—All damages directly traceable to the wrong done may be recovered, see DAMAGES, 2; *Coy v. Indianapolis Gas Co.*, 655.

When an action against a natural gas company for damages resulting from failure to supply gas is an action in tort, see NATURAL GAS; *Ib.*

TOWNSHIP TRUSTEE—Power of in the relocation of school houses, see SCHOOLS, 1; *Kessler, Tr., v. State ex rel. Clark et al.*, 221.

TRESPASS—

1. *Joint Action. — Joint Recovery.* — A plaintiff who sues several persons as joint trespassers has no right to any other than a joint recovery where the form of the issue is not modified by a severance of the answers. *Ashcraft et al. v. Knoblock*, 169.

2. *Joint-Tort-Feasors. — Separate Judgments. — Plaintiff has but One Execution.*—Where a plaintiff has obtained several judgments for joint trespass, he can have but one execution, and such execution, or order for it, discharges all others. *Ib.*

TRUSTS—

Resulting Trust. — Conveyance to a Person Not Paying Consideration. — Statutes Construed.—Under the last clause of section 8398, Burns' R. S. 1894 (2976, R. S. 1881), construed with section 8396, Burns' R. S. 1894 (2974, R. S. 1881), when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust results in favor of the latter, unless it shall be made to appear that by agreement, without any fraudulent intent, the person to whom the conveyance was made was to hold the land in trust for the one paying the purchase-money. *Barber et al., v. Barber et al.*, 390.

ULTRA VIRES—Diverting the funds of a beneficial association from the purposes to which the same had been dedicated, see BENEFICIAL ASSOCIATION, 3; *Koerner Lodge No. 6, K. of P., et al. v. Grand Lodge, K. of P., et al.*, 639.

VENDOR'S LIEN—Where a decree to enforce a vendor's lien has been reversed on appeal to the supreme court and such reversal has been entered in the lower court and no *lis pendens* notice has been filed a purchaser of the real estate against which the lien is sought to be enforced takes it discharged of such lien, see LIS PENDENS, *Pennington v. Martin*, 635.

VENIRE DE NOVO—When a special verdict is not subject to a motion for, see SPECIAL VERDICT, 3; *Bower, et al. v. Bower, et al.*, 393.

When Not Granted.—A *venire de novo* need not be granted because

the verdict in an action for a statutory penalty upon two alleged violations of the statute assesses the damages at the amount of a single penalty as if it is a finding upon but one paragraph of the complaint, without noticing the other; it is equivalent to a finding against the plaintiff upon the other.

Central Union Telephone Co. v. Fehring, 189.

VERDICT—See SPECIAL VERDICT.

Where the verdict in an action for a statutory penalty upon two alleged violations of the statute assesses the damages at the amount of a single penalty, as if it is a finding upon but one paragraph of the complaint, it is equivalent to a finding against the plaintiff upon one paragraph, see *VENIRE DE NOVO*; *Cent. Union Tel. Co. v. Fehring, 189.*

VICE PRINCIPAL—Distinguished from fellow servant, see *MASTER AND SERVANT*, 5; *Robertson v. Chicago, etc., R. R. Co., 486.*

WAIVER—Errors not discussed in brief are deemed waived, see *APPEAL AND ERROR*, 16; *Guy et al. v. Blue et al., 629.*

When householder's right of exemption is waived, see *EXEMPTIONS*, 1; *Moss et al., v. Jenkins et al., 589.*

Error is waived as to sustaining a demurrer to an answer by filing an amended answer, see *PRACTICE*, 7; *Davenport Mills Co. v. Chambers, 156.*

WIFE—Conveyance by forced heirs of childless second wife, see *STATUTORY CONSTRUCTION*, 5; *Smith v. McClain et al., 77.*

WILLFUL INJURY—Of passenger by street railway company, see *STREET RAILWAYS*, 1 and 2; *Conner v. Citizens' Street R. R. Co., 430.*

To constitute willful injury, the act which produced it must have been intentional or done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of, see *NEGLIGENCE*, 10 and 11; *Fisher, Admr., v. Louisville, etc., R. W. Co., 558.*

WILLS—

1. *Execution.—Attestation.—Statute Construed.*—Under section 2746, Burns' R. S. 1894, providing as to the form of execution and attestation of wills, it is not essential to the validity of a will that the attesting clause should recite all the forms required by the statute; it is sufficient if the witnesses subscribe their names as such opposite the word "witnesses." *Olerick, et al. v. Ross, et al., 282.*
2. *Construction.*—The purpose in construing a will is to ascertain and give effect to the intention of the testator so far as the same may not interfere with the established rules of law.
Mulvane v. Rude, Ex., et al., 476.
3. *Construction.—Common Law Rule.—Life Estate.*—The common law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, which was abolished in England in 1837, is in force in this State. *Ib.*
4. *Construction.—Bequests.—Common Law Rule.*—In bequests of personal property, words of inheritance were not required at common law, nor are they now, to give an absolute title. *Ib.*

5. *Construction.—Disposition of Real and Personal Property in Same Words.*—Whenever a will purports to dispose of real estate and personal property in the same words and in the same connection, and it is manifest that testator intended both to go together, the will must be so construed. *Ib.*
6. *Construction.—A Clear Devise Not Modified by Subsequent Indefinite Provisions.*—A devise in fee clearly and distinctly made or necessarily implied cannot be cut down or modified by subsequent provisions not clearly and distinctly setting forth the testator's intention to limit such devise. *Ib.*
7. *Construction.—Absolute Devise.—Gift Over.—Repugnancy.*—When real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given. *Ib.*
8. *Construction.—General Devise.—Limitation Over.—Repugnancy.—Exception to General Rule.—Life Estate.*—Where an estate is given to a person generally or indefinitely with power of disposition, it carries a fee, and any limitation over is void for repugnancy, except where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. *Ib.*
9. *Construction.—Absolute Devise.*—A testator by the first and third items of his will gave to his wife certain real estate in fee and the absolute title to certain personal property. In a fifth item of the will he expressed full confidence in his said wife and suggested, "That whatever part of the legacies hereinbefore made to her, and shall not have been expended or otherwise disposed of by her, may, at her decease, be given by her to such of my legal heirs as in her judgment shall need and would make good use of the same." And providing that in the event the said wife should die intestate, the remaining undisposed of property should go to a certain daughter. *Held*, that the will gave to the widow an absolute title to all the property, and that the devise over was void. *Ib.*
10. *Construction Of.—Life Estate.—Condition Subsequent.*—Where a testator, after devising to his wife a life estate in certain lands and the remainder over to his son, conditioned that the son should provide a comfortable support for his mother as long as she should live, and that in the event he failed to do so the land at her death should be sold and the proceeds thereof divided equally among testator's children, such provision is a condition subsequent and the title to such real estate vests in the son at the death of the testator, where the testator survived the wife and no alterations were made in the will.
Gingrich, et al. v. Gingrich, 227.
11. *Construction.—Active Trust.*—Testator devised real estate to his wife in trust, that in the event C. marries and has issue and the wife thought it advisable, she might convey the real estate to such "issue or children," and in case no such conveyance was made the real estate was to go at the wife's death to a certain township for school purposes. *Held*, That the trust created by the will was in the nature of an active one, that the interest of C.'s children was dependent upon the action of the wife in conveying same to them, and that by conveyance to one of C.'s children, the other children acquired no interest therein. *Crist et al. v. Schank et al., 277.*
12. *Setting Aside a Will and Establishing Lost Will, Enforced in Same Proceeding.*—While the right to set aside a will and its

probate is given by statute, and the right to establish a lost or destroyed will is of equitable cognizance, yet both rights may be enforced in one proceeding. *Bartlett et al. v. Manor et al.*, 621.

13. *Substitution of Unprobated Will for Probated Will.—Contest.—Limitations.*—A proceeding to substitute one will, not probated, for another which has been probated, involves the contest of the latter will, and must be commenced by the filing of complaint or petition within three years after such latter will has been offered for probate, as provided by section 2766, Burns' R. S. 1894. *Ib.*

14. *Contest Of.—Right to Prosecute Action as Poor Person.*—If the right to prosecute an action as a poor person under section 260, R. S. 1881 (261 Burns' R. S. 1894), can be extended by construction to proceedings to contest a will after the probate thereof, under sections 2596, 2597, R. S. 1881 (2766, 2767, Burns' R. S. 1894), the contestant would not, by reason thereof, be relieved from giving bond as required by sections 2596, 2597, (2766, 2767), *supra*.

Harrison v. Stanton et al., 366.

WITNESS—The defendant in a criminal prosecution, who becomes a witness in his own behalf, cannot be impeached on a collateral matter, see **EVIDENCE**, 10; *Stalcup v. State*, 270.

END OF VOLUME 146.

Ex. J. M.

